Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

APPARAJAN GANESAN,
Petitioner,

v.

SUDHA VALLABHANENI,
BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,
Respondents.

On Petition For Writ Of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 19, 2004

QUESTIONS PRESENTED

In this case, the United States Court of Appeals for the Fifth Circuit held that under the Rooker-Feldman doctrine, the federal district courts lack jurisdiction to entertain attacks on state judgments. The questions presented are:

Is the Common Law Marriage statute of the State of Texas constitutionally valid? (The common law marriage doctrine of the State of Pennsylvania was rescinded in Sept. 2003 and 39 other states have also done so.)

Does the Rooker-Feldman doctrine prohibit the federal court from consideration of the constitutionality of the Common Law Marriage statute of the State of Texas?

If State of Texas finds an alien "common law married" when she has contemporaneously declared herself to be single in federal, immigration, passport and tax documents, can the Bureau of Immigration and Customs Enforcement be allowed to standby and watch without taking any action?

LIST OF PARTIES

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fifth Circuit.

Apparajan Ganesan was the Appellant below. Sudha Vallabhaneni and the Bureau of Immigration and Customs Enforcement were the Appellees below.

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RELATED TEXAS AND FEDERAL CASES

Cases 1-5 are the instant case, where 5A and 5B are a bifurcation of the common law marriage from the divorce settlement.

Cases 6-7 are the result of USDC bifurcation of a mandamus request from the fraud action.

Case 8 is the bankruptcy case caused by actions directly associated with to the common law marriage case.

Cases 9-15 are for the solicitation of murder charge that resulted from alleged acts stemming from the common law marriage case and its resulting bankruptcy. Case 9A is a bail request; case 9B is the alleged offense.

	Court	**Judge**	**Case No.**
1.	5th Circuit Court	Dineen King, Jolly, Stewart	03-50193
2.	US District Court Western Dist. of Texas, Austin	James Nowlin	02-CA-00614
3.	Texas Sup. Court	no published opin	02-0520
4.	Texas Court of Appeals, 3rd Dist., Austin	Marilyn Aboussie, Yeakel, Puryear 96 S.W.3d 345	03-01-288CV
5A	250th Jud. Dist. Travis County, TX	John Dietz	96-14089
5B.	353rd District Court, Travis County, TX	Margaret Cooper	96-14089
6.	5th Circuit Court	Dineen King, Garza, Benavides	03-50519
7.	US District Court Western Dist. of Texas, Austin	James Nowlin	03-CA-00030

8.	US Bankruptcy Ct., Western District of Texas, Austin	Frank Munroe	No. 98-10295 FRM
9A.	5th Circuit Court	Edith Brown Clement, Davis, Duhe	03-50801
9B.	5th Circuit Court	not yet opined	03-51120
10.	US District Court Western Dist. of Texas, Austin	James Nowlin, Stephen H. Capelle (Magistrate)	02-CA-00753
11.	Texas Court of Appeals, 3rd Dist., Austin	Kidd, Yeakel 45 S.W.3d 197	03-00-125-CR
12.	390th Judicial Dist. Court, Travis County, Texas	Julie H. Kocurek	995324-A
13.	County Court III, Travis County, Texas	David Crain	492428

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Fifth Circuit are reprinted at Appendix 1A-8A. The decisions of the United States District Court for the Western District of Texas are reprinted at Appendix 1B-9B. The published opinions of two recent common law marriage cases in the State of Pennsylvania are reprinted at Appendix 1C-54C. The ruling of the Texas Supreme Court and petitioner's Petition for Review to that Court are reprinted in Appendix 1D-16D. The ruling of the Texas 3rd Court of Appeals and petitioner's Motion for Rehearing to that Court are reprinted in Appendix 1E-40E (Appeals Court opinion is also published at *Ganesan v. Vallabhaneni*, 96 S.W.3d 345).

JURISDICTION

The judgment of the Court of Appeals was entered October 22, 2003. A timely petition for rehearing was denied on January 6, 2004. This Court has jurisdiction pursuant to 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fifth, and Fourteenth Amendments to the United States Constitution, which provide in relevant parts as follows:

Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,... or the right of the people ... to petition the Government for a redress of grievances.

Amendment V: No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1: ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the provisions of 28 USC § 1331, Federal Question, which provides as follows: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

A. Background

In September, 1994, Apparajan Ganesan (a citizen of the United States) and Sudha Vallabhaneni (a citizen of the country of India) made contact. Subsequently, Vallabhaneni moved to Austin, Texas, and cohabitation with Ganesan began in February, 1995.

Over the next 18 months, the two discussed marriage, and declared to being unmarried on both Federal income tax forms. Vallabhaneni filed numerous Federal (including immigration), State, and other documents (including passport documents filed with the Indian consulate) on which she consistently declared herself to be single (see Appendix F for chronology). She also declared herself as single to her

employer, thus prohibiting Ganesan from obtaining any health benefits from that employer. There were several separations and reconciliations during this period.

At an eminent international conference of microchip innovations (ISSCC, February 1996) in San Francisco, CA, Vallabhaneni traveled with Ganesan, and she was not introduced there as his wife. In a visit to Switzerland by Ganesan to review the development of a microchip product with a contractor company, Meade, in July 1996, Vallabhaneni traveled with Ganesan, and she was not introduced to the Meade team as Ganesan's wife. During a visit to India in July 1996, the two visited Vallabhaneni's family for a few days. Ganesan did not sleep in the same house as Vallabhaneni because they were not married.

In September, 1996, Vallabhaneni permanently moved out, and immediately filed for a declaration of a Common Law Marriage beginning Sep. 1994 and a divorce as of Sep. 1996. Ganesan contested the claim of marriage.

No children resulted from this cohabitation.

In early 1997, in pre-litigation proceedings, Vallabhaneni successfully stopped a significant payment to Swiss company Meade claiming this was only an attempt by Ganesan to get his money out of the United States. However, Vallabhaneni knew her claim was a financial fraud because of the July 1996 visit to Meade and because she knew Ganesan's business arrangement with Meade began before she met Ganesan. Although the product was presented at ISSCC, February 1997, and was declared by the highly respected trade magazine EDN to be one of the 100 best products of that year, Ganesan's inability to pay Meade eventually led to Ganesan filing for bankruptcy in January 1998 (US

Bankruptcy Court, Western District of Texas [Austin], No. 98-10295 FRM).

In an effort to get Vallabhaneni to allow payment to Meade, Ganesan and Vallabhaneni had many phone calls, eventually resulting in Ganesan being placed in the Travis County jail for 2 weeks in June 1997. (All criminal charges stemming from these phone calls were negated in a subsequent trial, County Court No. III, Travis County, Case No. 492428, Hon. Judge David Crain presiding.) A discussion there with another prisoner and a discussion with another woman in September 1998 lead to Ganesan being arrested in November 1998 where be remained while the Travis County, Texas, DA attempted, unsuccessfully, to bring five single count indictments. Finally, in November 1999, Ganesan was indicted on dual counts of criminal solicitation of murder. In the trial on these charges, in December 1998, Ganesan was found guilty on both counts, but one count was overturned on appeal by the Texas Appellate Court. Ganesan is currently serving a 10 year sentence in the Texas Department of Criminal Justice system, and this case is on appeal to the 5th Circuit Court, Case No. 03-51120, filed Nov. 1, 2003.

B. The Common Law Marriage Civil Trial

In the resulting civil trial, beginning Sept.8, 1997, in the 353rd Judicial District, Travis County, Texas, Cause No. 96-14089, several potential jurors excused themselves by affirming that Texas Common Law Marriage statutes were a gentrification of "shacking up" and fundamentally conflicts with their religious beliefs on what constitutes marriage. Ganesan echoes their sentiments: Texas violated his First Amendment rights of free exercise of religion.

Vallabhaneni did not contest that she had declared herself to be single on numerous federal and non-federal documents during the period of cohabitation.

A representative of the Immigration and Naturalization Service (now the Bureau of Immigration and Customs Enforcement [BICE]) produced immigration documents showing she declared herself to be single contemporaneously (Appendix G, pages 4G-8G) and testified as to the importance BICE places on aliens keeping BICE updated regarding marital status (Appendix G, pages 9G-22G). A letter from Vallabhaneni's mother proposing a May 1995 marriage was presented for entry as evidence that Vallabhaneni had not mentioned this alleged common law arrangement to her own mother. The letter, however, was not allowed as evidence.

Jury determined there was a common law marriage, from February 23, 1995 and an Interlocutory Judgment confirming common law marriage was signed by State District Judge, the Honorable John Dietz, January 20, 1998.

Division of property hearing began on Nov. 6, 2000. It was ordered and decreed that Vallabhaneni was granted a divorce and property settlement was entered and signed on Feb. 21, 2001, State District Judge the Honorable Margaret A. Cooper presiding (Appendix E, pages 18E-35E).

C. State Post Trail Proceedings

Ganesan timely appealed the Common Law Marriage declaration to the Texas Court of Appeals, 3rd District, at Austin, 03-01-00288-CV (Appendix E, pages 36E-40E). The State District Court ruling was affirmed, March 21, 2002 by

State Appellate Judges, Chief Justice Marilyn Aboussie and Justices Yeakel and Puryear (Appendix E, pages 1E-17E).

On July 22, 2002, Ganesan filed a petition for review in the Supreme Court of Texas, Cause No. 02-0520, and the petition was denied August 29, 2002 (Appendix D).

Ganesan did not raise the issue of the constitutionality of the Texas common law marriage statute in the state proceedings. He did attempt (per the advice of BICE) without success to overturn the erroneous state court verdict.

D. Federal Post Trial Proceedings

Ganesan filed in U.S. District Court, Western District of Texas, on Sep. 24, 2002 for a ruling on the constitutionality of the Texas Common Law Marriage. He also named the BICE for its failure to prosecute Vallabhaneni for her multitude of fraudulent claims of being single on numerous legally binding documents, including Federal and State ones, while claiming to be married in a Texas court action. Ganesan had notified BICE and other Federal agencies 6-9 months prior to the state court common law marriage trial of these fraudulent claims.

On January 14, 2003, Ganesan asked the U.S. District Court to allow him to add U.S. Attorney, The U.S. State Department, and the U.S. Internal Revenue Service to the above case, and he filed *In Re Apparajan Ganesan* as part of this request. He requested a Writ of Mandamus be issued ordering the Federal agencies to take appropriate legal action against Vallabhaneni for her fraudulent claims of declaring herself single on numerous documents including Federal tax and immigration forms while contemporaneously claiming to

be in a common law marriage. See Appendix G. The District Court chose to make that filing a separate case.

On Jan. 28, 2003, the District Court dismissed the instant case for lack of subject matter jurisdiction, citing the Rooker-Feldman doctrine as baring them from reviewing a state court decision. The District Court **did not address** the constitutionality of the Texas Common Law Marriage statute.

Ganesan's Notice of Appeal to the 5th Circuit Court of Appeals was entered Feb. 10, 2003, and he also requested the District Court reconsider its Order. The District Court denied the request to reconsider, and action moved to the 5th Circuit on March 7, 2003.

Ganesan's 5th Circuit Appellate Brief was filed May 12, 2003, and it was denied Oct. 22, 2002, citing Rooker-Feldman but without comment on the question of the constitutionality of the Texas Common Law statute and without comment on the issues related to the BICE. Ganesan timely filed a request for rehearing on Dec. 4, 2003 (Appendix H), pointing to the Pennsylvania Court ruling on common law marriage of Sep. 17, 2003, based on very similar issues, and the 5th Circuit Court denied it on January 6, 2004.

SUMMARY OF ARGUMENT

The Common Law Marriage statute for the state of Texas is unconstitutionally vague in that it states, as one of its three provisions, the parties must "represent to others that they are married." Texas courts repeatedly use "hold out" to be synonymous to "represent." There is no definition of "hold out." There is no provision in the law for any negation of this "hold out."

"Hold out to be married" is not in any way quantified either in frequency or in time period. Thus, a single utterance by one of the two parties, in the presence of the other party and just one other person, that "we are married" could be interpreted to meet this requirement, at the whim of the triers, even if both declared on hundreds of other occasions, both before and after that utterance, "I am single." Different triers might rule hundreds of declarations of "we are married" as being negated by a single statement or document stating "I am single." Further, holding out to be married just in Texas is unconstitutional; one must do so everywhere or nowhere. Trial Judge Hon. Dietz advised jurors on a jury question to restrict their findings to being married in Texas.

The general validity of common law marriage statutes is in question. Only a few states continue to recognize them (see Appendix I, excerpt from West's Encyclopedia of American Law, 1998, Marriage). Recently, their history and relevance to modern society was considered in extensive detail by the Pennsylvania state appeals court. That court ruled the statute void on general, not Pennsylvania specifics, grounds (see Appendix C), and the New York Times saw this sufficiently important to report the ruling (Appendix C, page 1). "Many courts have continually opined that common law marriage claims are fruitful sources of perjury and fraud" (*PNC Bank Corporation v. Worker's Compensation Appeal Board (Stamos)*, 860 C.D. 2002 citing *Staudemayer v. Staudenmayer*, 714 A.2d 1016, 552 PA 253).

The Rooker-Feldman doctrine does not bar the Federal courts from ruling on the constitutionality of the Common Law Marriage statute of the State of Texas, particularly since that issue was not raised in state court proceedings.

A common law marriage, by its very nature, is a creature of decisional law, and the power to vitiate it rests in the hands of the judiciary (see *PNC Bank Corporation*).

A U.S. citizen relies on Federal agencies for protection from harm caused by an alien.

WHY WRIT SHOULD BE GRANTED

A. The Texas Common Law Marriage Statute is Unconstitutional

The historical considerations giving rise to judicial recognition of **informal** and **unrecorded** common law marital agreements cannot justify modern day perpetuation. Cost is not prohibitive, and public and quasi-public officials are readily available to solemnize this important and socially significant agreement. No valid reason exists to sanction circumvention of formalization and recording of marriages other than gentrification of "shacking up." Informal and unrecorded agreements are frequently subject to dispute

Inherent in the common law marriage is the recognition of an infirm process for marriage. This often results in an ephemeral arrangement such that economic support and dependency may be withheld randomly. Such a union, in the eyes of the public, is uncertain and may dissolve without warning.

From *PNC Bank Corporation v. Workers' Compensation Appeal Board (Stamos)* 860 C.D. 2002 (Appellate Brief, page 18):

> When the reason which gave rise to legal presumption no longer exists, then the presumption should also change. *Cessame ratione legis, cessat et*

> *ipsa lex*, meaning "The reason of the law ceasing, the law itself also ceases" (Black's Law Dictionary). The common law marriage doctrine should be re-evaluated, in light of the changing means of transportation and communication, and easy access to individuals licensed to perform marriages.

V.T.C.A. Family Code § 2.401(a)(2) defines the proof for an informal marriage to be:

> (a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:
>
> (2) the man and woman agreed to be married
> and after the agreement they lived together in this state as husband and wife
> and there represented to others that they were married.

The vagueness of the Texas statute with respect to the "hold out" provision is sufficiently open to interpretation that casual utterances could have very unintended results. There is no similar provision in the law for countermanding any statement of being married.

The constitutional issues are with respect to the third provision of § 2.401(a)(2): Can representing to others in Texas (as married) differently from elsewhere (as single) pass constitutional muster (a person cannot be both married and single at the same time)? The vagueness and over breadth of this statute and its constitutionality can be examined without any intertwining of the issues involved in this specific case.

> *Marks v. Stinson*, 19 F.3d 873, 885-886:
> ... constitutional and fraud claims had not been determined by state court, nor were they inextricably intertwined with prior state court decisions; Court could find that fraud and constitutional claims had merits without also finding that state court erred when it dismissed the action ....
>
> *Peterson Novelties v. City of Berkley,* 305 F.3d 386, 392:
> ... federal courts could hold that the defendants violated retailer's constitutional rights without implicitly holding that the state court wrongly decided the issue before it ....

Review of constitutionality of Texas Common Law Marriage statutes could easily be done based on the plethora of conflicting Texas state court decisions without ever reviewing the instant case. From *Matter of Estate of Giessel* 734 S.W.2d 27; *Persons v. Persons* 666 S.W.2d 560; *Winfield v. Renfro* 821 S.W.2d 640, Ganesan noted that the District Court could make such a determination based on other Texas case rulings.

Ganesan's complaint to USDC mounts a general challenge to the constitutionality of a state statute or rule. The statute on its face is vague regarding representation as to where, by whom, and how often.

That the statute repeatedly produces verdicts in conflict with Federal income tax declarations resulting in fraud (some legal scholars opine this as social engineering by the Texas judiciary) is ascertained from *Matter of Estate of Giessel*, 734

S.W.2d 27. In *Giessel*, Texas courts ignored affirmations over many years in federal income tax forms as "single."

That common law marriage statutes are outmoded and unconstitutional can be inferred in that 39 states no longer have them. Every few years another state declares them void. It is time to **slay this dragon** nationwide in the interest of comity and equal protection. Ganesan requests this Court consider the Pennsylvania Appeals Court overturning the Pennsylvania Common Law Marriage statute (*PNC Bank Corporation v. Workers' Compensation Appeal Board (Stamos),* PA Appeals Court, 860 C.D. 2002). The history of Common Law Marriage statutes is discussed in detail, and the reasoning for such statutes being inappropriate in modern society is also detailed (Appendix C). Those discussions, although applied by State Appellate Court, are broad, not limited to any particular Pennsylvania conditions and, in fact, apply to all Common Law Marriage statutes.

Further, V.T.C.A. Family Code § 2.401(b) provides the following limitation:

> (b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

Thus, the Texas Common Law Marriage statute has built into it an evanescence presumption that no other form of marital contract has, giving it a "built in" vagueness.

The fundamental case for determining vagueness is *Grayned v. City of Rockford,* 92 S.Ct. 2294, 2299:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement.

and at 2302:

> A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct.... The crucial question, then, is whether the ordinance sweeps with its prohibitions what may not be punished under the First and Fourteenth Amendments.

The void for vagueness doctrine prohibits the enforcement of a law that contains words "so vague that [persons] of common intelligence must necessarily guess at its meaning and differ on its application" (*Roberts v. U.S. Jaycees,* 468 U.S. 609, 629, 104 S.Ct. 3244, 82 L.Ed. 462 [1984] quoting *Connally v. Gen. Constr. Co.,* 269 U.S.385, 391, 46 S.Ct. 126, 70 L.Ed. 322 [1926]). Legislation "must articulate terms 'with a reasonable degree of clarity' to reduce the risk of arbitrary enforcement and allow

individuals to conform their behavior to the requirements of the law."

The Federal court must "consider any limiting construction that a state court or enforcement agency has proffered" (*Gresham,* 225 F.3dat 908 quoting *Vill. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 N.5, 102 S.Ct. 1186, 71 L.Ed.2d 362 [1982]). But only stating "representing to others" is unreasonably vague.

In addition to vagueness and overbreadth, a statute can be facially unconstitutional if its enforcement

(a) results in violation of criminal laws,

(b) violates supremacy clause (Federal law supercedes state law), or

(c) produces axiomatically incorrect results (sun rises in the west; person can be single and married at the same time).

Ganesan cites some relevant case law and cites on Constitutionality:

Zwickler v. Koota, 88 S.Ct. 391, 389 U.S. 241:

> Statute is void for vagueness which forbids or requires doing an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

Hynes v. Mayor and Council of Borough of Oradell, 96 S.Ct. 1755:

> Supreme Court could not construe state statute so as to cure unconstitutional vagueness.

City of Chicago v. Morales, 119 S.Ct. 1849, 527 U.S. 41:

> Imprecise laws can be attacked on the face under two doctrines: first, the overbreadth doctrine permits the

> facial invalidation of laws that inhibit the excise of First Amendment rights if the impermissible application of the law are substantial when judged in relation to statute's plainly legitimate sweep; second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and the public that are sufficient to guard against the arbitrary deprivation of liberty interests....
>
> A law fails to meet the requirements of due process clause if it is so vague and standardless that it leaves the public uncertain to the conduct it prohibits.

Zellerbach Paper Co. v. Helvering, 55 S.Ct. 127, 293 U.S. 172:

> Statute of uncertain meaning will not be readily made an instrument for much hardship and confusion.

Maynard v. Cartwright, 108 S.Ct. 1853, 486 U.S. 356:

> Vagueness challenges to statutes not threatening First Amendment interests are examined in light of facts of case at hand; statute is judged on as-applied basis.

The practice of striking down a law because it is void for vagueness is not unique to First Amendment jurisprudence, but rather it is a general principle of constitutional and criminal law (Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech,* § 6.13 [2003]).

Ganesan asserts that the third provision of Texas Common Law Marriage statue, V.T.C.A. 2.401(a)(2):

(a) is vague,

(b) 'reasonable person' standard cannot be read into it (reasonable person would not selectively hold oneself simultaneously married and single and only in Texas),

(c) narrowing construction is not available (since it is the goal of the state of Texas to find marriage [V.T.C.A. § 1.101, Every Marriage Presumed Valid: "[I]t is the policy of this state to preserve and uphold each marriage against claims of invalidity unless a strong reason exists for holding the marriage void or voidable."]), and

(d) statute cannot be saved by striking unconstitutional third provision, since intent of getting married (provision one) and living together (provision two) would not constitute marriage in a modern society.

The abolishment of common law marriages would eliminate the inevitable confusion and questions concerning the validity of an alleged union which many courts have noted as a "fruitful source of perjury and fraud."

Cessame ratione legis, cessat et ipsa lex.

B. The Rooker-Feldman Doctrine does not apply

"Rooker-Feldman is not a constitutional doctrine. Rather, it arose out of a pair of negative inferences drawn from the statues 28 USC § 1331 and 28 USC § 1257." (*In Re Grunz*, 202 F.3d 1074, 1078).

In addition, in *Demor v. Hyung Joon Kim*, 123 S.Ct. 1708, 1709, "When Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear."

From *Albright v. Oliver*, 114 S.Ct. 807, 812, "Due process clause of the 14th Amendment covers both substantial

and procedural rights .... The protections of substantive due process have for the most part been accorded to matters related to marriage...." This establishes the basis of Ganesan's constitutional claims.

From *In Re Gruntz*, 202 F.3d 1074 n.3, "Since Feldman (103 S.Ct. 1303), the Supreme Court has declined opportunities to extend or even to apply the doctrine."

The lower Federal Courts held that they did not have jurisdiction because the Rooker-Feldman doctrine prohibits the Federal courts from reviewing state court decisions.

In the instant case, the Federal Court is not being asked to determine if the state court decision was correct. Rather, the Court is being asked to consider if the law upon which that decision is based is constitutionally acceptable. The constitutionality issue was not raised in any state court proceedings and was properly raised for the first time in the Federal District Court. The 5th Circuit Court's ruling does not clarify how the Rooker-Feldman doctrine prevents a Federal court from ruling on the Constitutional validity of the Texas Common Law Marriage statute or on how such a ruling cannot be done without considering the specifics of the instant case. Ganesan cites:

> *Feldman*, 103 S.Ct. 1303, 460 U.S. 462:
> The court stated, however, that the district court did have subject matter jurisdiction to the extent that Hickey Feldman made a general challenge to the constitutionality of the D.C. Bar Admission Rule.... The crucial point is whether the district court is in essence being called upon to review the state court decision.

> *Centifanti v. Nix*, 865 F.2d 1422, 1430
> *Focus v. Allegheny County*, 75 F.3d 834, 840:
> Texas Common Law Marriage claims have led to judicial decisions which are all over the map. Ganesan's constitutional claims would clarify it for all similarly situated future petitioners indicating prospective relief.

The Texas Common Law Marriage statute fails constitutional scrutiny, without any need to consider the specifics of the instant case. Ganesan notes that whether a general constitutional challenge is barred by Rooker-Feldman is tested in *Wilson v. Shumay*, 264 F.3d 120, 125 through the following two questions:

(1) Does the substance of the claims refer to the personal circumstances of the case?

(2) Would all of the relief sought impact petitioner individually?

Petitioner addressed both of these questions in his briefs to the 5th Circuit, and the answer to both is definitively "no."

Per *Dubinka v. Judges of Superior Court*, 23 F.3d 218,222, Ganesan's claim is not inextricably intertwined since the District Court has to scrutinize only the challenged rule and not the application of the rule. There is abundant case law, independent of the instant case, to support such scrutiny. Challenge to constitutionality of the Texas Common Law Marriage statute is not a challenge on any particular case.

> *Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103, 1108:
> ... plaintiff was mounting a discrete general challenge to the validity of Utah adoption laws, not challenging the merits of a particular state ruling.

Per *Galloway v. City of New Albany, Miss.*, 92 F.Supp 2d 592, 596-597; *Hoyle v. Priest*, 59 F.Supp.2d 827, 833-835; *Nollet v. Justices of the Trial Court of Comm of MA*, 83 F.Supp.2d 204, 208; and *Storck v. Suffolk County*, 62 F.Supp.2d 927, 938-939, state court clearly did not decide constitutional issues in any of its decisions in the instant case.

Per *Larsen v. Senate of the Commonwealth of Pennsylvania*, 955 F.Supp. 1549, 1557-*1559*, in the instant case, the state courts did not rule on the constitutionality of the Texas Common Law Marriage statute so a Federal Court exercising jurisdiction on the constitutionality issue would not overrule prior state court judgment.

Ganesan does allege, however, the common law decree was obtained by an alien by committing marital fraud in violation of immigration laws, passport laws, federal tax laws, health insurance laws, state automobile insurance laws, federal bankruptcy laws, etc., along with the lack of timely action by responsible Federal agencies. Hence, a federal court may entertain a collateral attack on the resulting state court verdict (*Resolute Insurance Co v. North Carolina,* 397 F.2d 586, 589).

Ganesan notes that he alleged two distinct actions of fraud, one financial and the other marital, by Vallabhaneni. First, she committed **financial fraud** by claiming that his business dealings were fraudulent, and she uses this to stop his legitimate business payments in pre-litigation proceedings, which eventually led to his bankruptcy. Second, she committed **marital fraud** by claiming to be his common law wife while contemporaneously claiming to be single on numerous state and federal documents.

In *American Airlines v. Department of Transportation,* 202 F.3d 788, 801, 5th Circuit Court ruled "... [thus] we have not applied the Rooker-Feldman jurisdictional bar in cases where we have found it inappropriate to require federal court to give faith and credit to state court judgment." Vallabhaneni violated over a dozen federal statutes by affirming in state court that there was a common law marriage. Under 28 U.S.C § 1331, "The district courts shall have original jurisdiction ... arising under ... laws ... of the United States."

In *Dababnah v. West Virginia Board of Medicine,* 47 F.Supp.2d 734, 747-748),

> If state's judicial system does not apply or uphold minimal constitutional due process procedures to ensure fairness and the whole state judicial process appears to have been corrupted by the highly partisan elections and the low standards the judges and the justices have engaged in, then the principle of comity which under grids the Rooker-Feldman doctrine is absent and doctrine is inapplicable, thus permitting review of state court decision.

In the instant case, a politically elected state district judge showed total disregard for repeated declaration of "single" in multiple federal documents. That judge has periodically announces in the local newspaper his ability to redistribute wealth using his office.

Ganesan's dilemma is clear: raise claims in an allegedly corrupt state court, loose, and then be barred 'res judicata' in Federal court, or raise claims initially in Federal court and be barred by Rooker-Feldman (*Dababnah v West Virginia Board of Medicine,* 47 F.Supp.2d 734, 747-478). Such "catch-22" situations are not what the law intends. When Ganesan's constitutional rights are violated and multiple

federal laws are violated, a private cause of action is mandated.

Alien Vallabhaneni's violation of multiple federal statutes resulted directly in substantial financial harm to Ganesan, and the issue of direct cause of action in such instances is opined in *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074:

> when a statute is entirely silent as to whether Congress intended to provide a private cause of action to redress violations, such silence may indicate that the question never occurred to the Congress at all, or mere oversight in failing to deal with the matter intended to be covered, or it may demonstrate deliberate obscurity to avoid controversy that might defeat passage of legislation, or it might have resulted from an assumption by Congress that court would recognize a private cause of action.

Ganesan notes that Federal courts "have virtually unfailing obligation to exercise jurisdiction given them" (*Mounkes v. Conklin*, 922 F.Supp. 1501, 1503).

Rooker-Feldman doctrine is specifically intended to protect the state court judgment (*Kenmen Engineering v. City of Union*, 314 F.3d 468). Ganesan, in his Brief to the US District Court, specifically pointed out that the fraud and financial harm to him arose from pre-litigation financial fraud asset freezing proceedings in state court. The fraud issues are unrelated to any issues of the Rooker-Feldman doctrine: in *General Auto Service v. City of Chicago*, IL 319 F.3d 902, 903, 905, Rooker-Feldman was held not applicable because it "concerned the city's pre-litigation conduct rather than an injury caused by a judicial decision …."

Moreover and keeping in mind that Ganesan went bankrupt due to Vallabhaneni's fraud, from *In Re Gruntz*, 202 F.3d 1074 (9th Cir):

> Infirm judgments are not entitled to full faith and credit in federal courts.... Habeas corpus and bankruptcy proceedings are proceedings with root in statutory jurisdiction parallel to and in no way precluded by the Rooker-Feldman doctrine. Bankruptcy legislations create an exception.

Further, defendant BICE was never a party in any state court proceedings. Per *Cigna Property and Casualty v. Ruiz*, 254 F.Supp.2d 1263 citing *Johnson v. Degrandy*, 114 S.Ct. 2547, "The Rooker-Feldman doctrine applies only to litigants who were parties in both the state and the federal action."

Rooker-Feldman cannot apply here since Vallabhaneni's guilt in both the marital and financial frauds easily coexists with the state court's common law finding. Vallabhaneni, in her 5th Circuit Brief on Page 6, conceded that *Pennzoil v. Texaco*, 107 S.Ct. 1519 permits re-litigation of issues in federal courts and narrowly provides doctrinal protection only to state court verdict.

Rule 8 of Federal Rules of Civil Procedure permits Ganesan to make multiple claims and request inconsistent reliefs. In addition, "[Federal Rules of Civil Procedure 60(b1)] does not limit the power of the court to entertain an independent action to ... set aside a judgment for fraud upon the court" (*Browning v. Navarro*, 826 F.2d 335). Court, in exercising its jurisdiction, can choose selectively among the various reliefs or, in the case of a Pro Se litigant (as is Ganesan) fashion an alternative relief of its own. While doing so, court may examine the constitutionality of Texas Common Law marriage statute without reviewing the instant

case since Ganesan cited several other state court cases in which Texas courts violated Federal laws in their judgments (e.g., *Johnson v. Rodrigues (Orozco),* 226 F.3d 1103, 1108).

From *Miller v. Stanmore*, 636 F.2d 986:

> When the complaint seeks recovery directly under the Constitution, federal question of jurisdiction is directly established and dismissal for lack of jurisdiction is only appropriate when the court decides that the federal claim is immaterial and made solely for purpose of obtaining jurisdiction or where the claim is unsubstantiated and frivolous.

It is uncontested that an alien committed marital and financial fraud violating the laws of the United States and resulting in Ganesan's constitutional right to property to being violated. The Federal Courts need no other basis for jurisdiction.

Catz v. Chalker, 142 F.3d 279, pages 290-292 summarize the instant case, "... presented a constitutional claim in which it was incidental that the underlying action was divorce." Even more closely, pages 293-295, "Former husband's due process obligations did not implicate the merits of the divorce decree, only the proceedings leading up to it." In the instant case, Ganesan claim of financial fraud does not attack the merits of the common law ruling, only the proceedings leading up to it.

In summary, Vallabhaneni and her lawyer cooked up a scheme to get significant money from Ganesan by abusing Texas statutes, skewed disproportionately toward a finding of common law marriage, to win the claim. But in so doing, Vallabhaneni was caught in an endless stream of federal declaration contrary to her state claims, and a politically

elected state judge wantonly disregarded those federal declarations of marital status.

Ganesan requests the Court clarify the "invocation of judicial helplessness" against the "virtually unfailing obligation to exercise jurisdiction given to the Federal courts":

> *City of Houston v. Hill*, 482 US at 467
> *Colorado River v. United States*, 424 US 800, 817
> *Mounkes v. Conklin*, 922 F.Supp 1501, 1503:
> Abstention from jurisdiction is exception and not the rule; Federal courts have virtually unflagging obligation to exercise jurisdiction given them.

Ganesan requests this Court consider the significant discontent among respected jurists over the ever expanding reach of the Rooker-Feldman doctrine in recent years. Four recent decisions along with numerous articles in various law reviews have begun to express serious concerns regarding the application of *Rooker-Feldman.*

In *Rogers v. Swepton*, 267 F.Supp.2d 549 (USDC, S.D. West Virginia, June 30, 2003), "Some respected jurists, along with a few commentators, have decried the doctrine's ever-expanding reach in recent years."

In *Vulcan Chemical Technologies, Incorporated v. Baker*, 297 F.3d 332, 338 n. 2 (4th Circuit, May 21, 2002), Judge Niemeyer noted the "beleaguered *Rooker-Feldman* doctrine."

In *Ahmed v. State of Washington*, et al, 276 F.3d 464 (9th Circuit, Aug. 28, 2001), Judge Noonan, in a dissenting opined, on *Rooker-Feldman*:

> [W]hy should we penalize a plaintiff who very naturally began the appeal process held out to him...? Are we to say that if a state employee sues a state administrative body and could have made a federal argument, he has lost any chance to sue under 1983? Are we to encourage immediate resort to the federal courts, skipping any possible state remedy?
>
> It has been speculated that the new federalism is at least in part responsible for the recent plethora of cases applying *Rooker-Feldman*.... Such an explanation is plausible given there have been over 500 cases in the last eleven years invoking *Rooker* and *Feldman*.... It is observable that application of these cases to oust a federal court of jurisdiction is a harsh rule....
>
> It is a rule that permits invocation of "jurisdictional helplessness"---"What Could I do? The doctrine is mandatory."

In *Zurich American Insurance Company v. Superior Court of the State of California*, 326 F.3d 816 (7th Circuit, April 17, 2003) at 822,

> The federal claim does not therefore seek to set aside the state court order and does not depend on determination that the sate court erred.

and at 823, 824,

> A mere assertion that a district court, in considering a claim that is independent of the state court judgment, might negate a legal conclusion that the state court reached is insufficient to trigger application of *Rooker-Feldman. See Gash Assoc.*, 995 F.2d at 728.

In the above cases, references are made to numerous Law Review papers from previous years. The above cited *Rogers v. Swepton* references

> Adam McLain, Comment, *The Rooker-Feldman Doctrine: Toward a Workable Role* 149 U. Pa. L.Rev. 1555, 1573 (2001), (noting the doctrine's "explosive growth" in lower federal courts), [FN2]
>
> [FN2] *Rooker* was decided in 1923. The *Feldman* decision came 60 years later. Interestingly, of the thirty-eight cases in which the search terms "Rooker and Feldman" appear in WESTLAW's Fourth Circuit database, nearly thirty were decided in just the last five years. The doctrine's application has resulted in many split decisions. *See, e.g., Pfifer v. City of New York*, 289 F.3d 49, 62 (2nd Cir., 2002)(Jaccobs, J., dissenting in part); *Dababnah v. Burnside*, No. 99-2051, 2000 WL 655945 at *2 (4th Cir., May 12, 2002) (Motz, J., concurring in judgment)("I would not find that the *Rooker-Feldman* doctrine deprives a federal court of jurisdiction over this action."); *Patmon v. Michigan Supreme Court*, 224 F.3d 504, 510 (6th Cir. 2000)(Jones, J., dissenting in part); *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir.1996) (five judges dissenting from denial of hearing en banc).
>
> .... to help avoid misapplication of a doctrine one commentator has aptly described as "confusing and troublesome." Rachel Thomas Rowley, Comment,

Several other Law Review papers address this issue:

> (1) Thomas D. Rowe, Jr., ""Rooker-Feldman, Worth Only the Power to Blowit Up?," Notre Dame Law Review, May, 1999, 74 NTDLR 1081.

(2) Susan Bandes, "The Rooker-Feldman Doctrine: Evaluating its Jurisdictional Status," Notre Dame Law Review, May, 1999, 74 NTDLR 1175.
(3) Suzanna Sherry, "Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action," Notre Dame Law Review, May 1999, 74 NTDLR 1085.
(4) Jack M. Beermann, "Comments on Rooker-Feldman or Let State Law be Our Guide," Notre Dame Law Review, May 1999, 74 NTDLR 1209.

Ganesan requests this Court take note of the application of Rooker-Feldman doctrine among various Circuit Courts. In *Pennzoil v. Texaco*, 107 S.Ct. 1529, separate concurrences of a majority of judges opined that Rooker-Feldman doctrine would not automatically bar a federal claim not raised in state court, buttressing the 10th Circuit's position of affording doctrinal sanctity only to state court judgments (*Kenman Engineering v. City of Union*, 314 F.3d 468). The 7th Circuit opines the doctrine does not prohibit re-litigation of claims and issues (*Gary v. Geils*, 82 F.3d 1361, 1365). Supreme Court, in *Feldman*, 103 S.Ct. 1303, 1314-1316, allows a general constitutional challenge of a statute and buttresses the 8th Circuit in *Lemmons v. St. Louis*, 222 F.3d 488, 494, the 3rd Circuit in *Centifani v. Nix*, 865 F.2d 1422, 1430, the 9th Circuit in *Dubinka v. Judges*, 23 F.3d 218-222 and *Doe Associates v. Napolitano*, 252 F.3d 1026-1029, and the 10th Circuit in *Johnson v. Rodrigues*, 226 F.3d 1103, 1108.

Most Circuit Courts have held Rooker-Feldman doctrine not binding on claims stemming from pre-litigation proceedings (page 3 of 26 of Reply Brief to 5th Circuit Court, Vallabhaneni's false claim in pre-litigation proceedings of a fraudulent business arrangement was used to freeze Ganesan's assets). The 5th Circuit is unique in that it almost

always cites jurisdictional helplessness (see *Jordon v. Hall*, 275 F.Supp.2d 773 and its 5th Circuit citations).

C. BICE was deficient in not taking timely action

BICE was notified approximately 9 months before any state court proceedings began of alien Vallabhaneni's marital fraud in multiple immigration documents.

We look at the kind of cases where the BICE took action against sham marriages. In *US v. Posadarios*, 158 F.3d 832, 862, Mr. Rios was convicted for lying on immigration forms. In *US v. Carrillo-Colmenero,* 523 F.2d 1279, Colmenero was prosecuted for knowingly making a false statement.

Witter v. I.N.S., 113 F.3d 549, 552-553 is a 5th Circuit case illuminating the issues of the Texas Common Law Marriage statute. "In this case, a Texas state court order vacating annulment retroactively validated parties' marriage from its inception under Texas law." On page 552, the Court found that, while the common law marriage may be valid for all concerns of the state … it cannot and does not make a lie uttered to a visa officer in 1989 a truthful statement when it was made." The case establishes clearly the basis for Ganesan's claim of fraud.

Also, in *Hendrix v. I.N.S.,* 583 F.2d 1102, 1104 "Representation that a woman was unmarried to the I.N.S. could not retroactively cure the fact that she was found married at a later date" explains the fraud on the date of trial.

In *Garcia v. I.N.S.*, 31 F.3d 441, 443, court refused to give retroactive effect to annulment procured after entry to the US to sanction a willful representation made at the time

of the application for visa. See also *Matter of Mayana*, 17 I & N Dec 111 and *Matter of Astorga*, 17 I & N Dec 1.

"Changes in marital status undertaken after entry into United States should not be used to manipulate immigration law" (*Witter v. I.N.S.*, 113 F.3d 549, 553; *Garcia v. I.N.S.*, 31 F.3d 441, 443; *Hendrix v. I.N.S.*, 583 F.2d 1102, 1104). There is no evidence that Vallabhaneni informed BICE officials she was relying on a common law marriage. As per page 554 of *Witter*, the BICE clearly found Vallabhaneni and Ganesan were not married, and arguments to the contrary were misrepresentations.

"A marriage is a sham when an alien claims a marriage to obtain an advantage" (*Lutwak v. US*, 344, US 604, 611-612; *Bark v. I.N.S.*, 511 F.2d 1201-1202). "Proof of intent to deceive is not required; rather knowledge of the falsity of representation is sufficient" (*Forbes v. I.N.S.*, 48 F.3d 439, 442). If Vallabhaneni's argument is accepted, "It will rest with the married alien to decide unilaterally whether his or her marriage was valid or invalid according to the goal he or she wishes to achieve" (*Hendrix v. I.N.S.*, 583 F.2d 1102, 1104).

BICE has been willing to take action when claims in state court and statements made on immigration papers are in conflict. Ganesan's charges deserve the same treatment.

Fundamental questions regarding marital status are in the records alien Vallabhaneni submitted to federal agencies, and then she lied about them while suing citizen Ganesan. The Federal government, having made a decision to allow her to reside in this country should not stand idle while her fraudulent claims harm one of its citizens.

CONCLUSION

"If the end result is unlawful, it matters not that the means used in violation may be lawful" (opinion of Supreme Court Justice Douglas announced by Justice Berger in *California Motor Transport Company v. Trucking Unlimited*, 92 S.Ct. 609, 614). Also, *Toll v. Moreno*, 102 S.Ct. 2977, 2987, 458 US 1, 20, "The Supreme Court may affirm, modify, vacate, set aside, or reverse any judgment ... and may ... require such further proceedings to be had as may be just under the circumstances."

Although all marriages are civil unions, not all civil unions are marriages. Common law marriages are a gentrification of "shacking up." The Texas Common Law Marriage statute is unconstitutional; common law marriage statutes are in public disfavor nationwide and should be declared invalid by this Court. Rooker-Feldman does not apply to this case, and timely action by BICE would have prevented this tragedy.

Accordingly, the Writ of Certiorari for this case should issue, and Pro Se litigant should be provided all the remedy available under the law to recover his damages.

Apparajan Ganesan, Pro Se
TDCJ #904088
Sanders Estes Unit
1100 Hwy. 1807
Venus, TX 76084

March 19, 2004

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 CAMP STREET
NEW ORLEANS, LA
70130

July 21, 2003

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 03-50193 Ganesan v. Vallabhaneni
USDC No. A-02-CV-614-JN

The court has taken the following action in this case: appellant's motion to stay further proceedings in this Court has been DENIED.

Sincerely,
CHARLES R. FULBRUGE III, Clerk

By: signed:// Lisa Conrad
Lisa Conrad, Deputy Clerk
504-310-7697

Mr Apparajan Ganesan
Mr Charles Alfin Herring Jr
Mr John Francis Paniszczyn

MOT-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of
Appeals Fifth Circuit
F I L E D
October 22, 2003
Charles R. Fulbruge III
Clerk

No. 03-50193
Conference Calendar

APPARAJAN GANESAN

Plaintiff-Appellant

versus

SUDHA VALLABHANENI;
BUREAU OF IMMIGRATION AND
CUSTOMS ENFORCEMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. A-02-CV-614-JN

Before KING, Chief Judge, and JOLLY and STEWART, Circuit Judges. PER CURIAM:*

Apparajan Ganesan, Texas inmate #904088, proceeding pro se, appeals the district court's dismissal of his civil complaint.

---

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.R. 47.5.4.

Ganesan's motion for hearing en banc is DENIED.

"The Rooker-Feldman** doctrine holds that federal district courts lack jurisdiction to entertain collateral attacks on state judgments." United States v. Shepherd, 23 F.3d 923, 924 (5th Cir. 1994). If the district court must examine issues that are "`inextricably intertwined' with a state judgment, the [district] court is in essence being called upon to review the state-court decision, and the originality of the district court's jurisdiction precludes such a review."' Id. Under the Rooker-Feldman doctrine, Ganesan may not attempt to invalidate in federal court the state court judgment obtained in the common law marriage proceeding. See id.

Ganesan's appeal is without arguable merit and is frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is DISMISSED. 5TH Cir. R. 42.2. The dismissal of Ganesan's appeal counts as a strike for purposes of 28 U.S.C. § 1915(g). Ganesan is warned that should he accumulate three strikes, for purposes of 28 U.S.C. 1915(g), he will be unable to proceed in forma pauperis in any civil action or appeal unless he is under imminent danger of serious physical injury.

APPEAL DISMISSED AS FRIVOLOUS; MOTION FOR EN BANC HEARING DENIED; SANCTIONS WARNING ISSUED.

** Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 482 (1983); Rooker v. Fid. Trust Co., 263 U.S. 413, 415 (1923).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF
APPEALS
F I L E D
JAN 08, 2004
Charles R. Fulbruge III
Clerk

No. 03-50193

APPARAJAN GANESAN

Plaintiff-Appellant

versus

SUDHA VALLABHANENI;
BUREAU OF IMMIGRATION AND
CUSTOMS ENFORCEMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. A-02-CV-614-JN

ON PETITION FOR REHEARING

Before KING, Chief Judge, and JOLLY and STEWART, Circuit Judges.

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

Signed:// Carolyn Dineen King
UNITED STATES CIRCUIT JUDGE

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

United States Court of Appeals
FIFTH CIRCUIT
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NEW ORLEANS,
LA 70130

January 12, 2004

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 03-50193 Ganesan v. Vallabhaneni
USDC No. A-02-CV-614-JN

The court has taken the following action in this case: appellant's motion to stay the mandate has been DENIED.

Sincerely,
CHARLES R. FULBRUGE III, Clerk
By: signed//: unreadable
Lisa Conrad, Deputy Clerk
504-310-7697

Mr Apparajan Ganesan
Mr Charles F Herring Jr
Mr John Francis Paniszczyn

MOT-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
JAN 16 2004
Clerk, U.S. District Court
Western District of Texas
BY_____
DEPUTY CLERK

U. S. Court of Appeals
FILED
OCT 22 2003
Charles R. Fulbruge III
Clerk

No. 03-50193
Conference Calendar

D.C. Docket No. A-02-CV-614-JN

APPARAJAN GANESAN
Plaintiff-Appellant

v.

SUDHA VALLABHANENI; BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas, Austin.

Before KING, Chief Judge, and JOLLY and STEWART, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the appeal is dismissed as frivolous.

IT IS FURTHER ORDERED the plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of the Court.

ISSUED AS MANDATE: JAN 14 2004

Clerk, U.S. Court of Appeals,
Fifth Circuit
By _____
Deputy
New Orleans
JAN 14 2004

1B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 JA 24 PM 2:54
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN	§	
	§	
VS.	§	CIVIL NO.
	§	A-02-CA-614 JN
SUDHA VALLABHENI and	§	
US IMMIGRATION AND	§	
NATURALIZATION SERVICE	§	

ORDER

Before the Court is Defendant Vallabhaneni's Motion for Extension of Time (Doc. No. 15) filed on January 23, 2003. Upon careful consideration of the Motion and the applicable legal authority, the Court finds the Motion has merit and should be granted.

IT IS THEREFORE ORDERED that Defendant's Motion for Extension of Time is GRANTED.

IT IS FURTHER ORDERED that Defendant's time to Respond to Plaintiffs Motion to Protect Assets and Plaintiff's Motion for Partial Summary Judgment is hereby

EXTENDED until ten days after the Court rules on Defendant's Motion to Dismiss.

SIGNED AND ENTERED this 24th day of January 2003.

Signed:

JAMES R. NOWLIN
CHIEF UNITED STATES
DISTRICT JUDGE

3B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 JA 28 PM 4:17
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN	§	
	§	
VS.	§	CIVIL NO.
	§	A-02-CA-614 JN
SUDHA VALLABHENI and	§	
US IMMIGRATION AND	§	
NATURALIZATION SERVICE	§	

ORDER

Before the Court is Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Clerk's Doc. No. 8) filed January 10, 2003. Plaintiff has filed no response. Thus, pursuant to Local Rule for the Western District of Texas CV-7(d), the Court grants Defendant's Motion as unopposed. Accordingly, the Court issues the following Order.

Additionally, having reviewed the entire case file and the applicable legal authority, the Court finds that the Defendant's Motion succeeds as well on the merits. Plaintiff is attempting to effect appellate review of a state court judgement through this Court. Pursuant to the Rooker-Feldman doctrine, this Court lacks jurisdiction to so sit. *See*

Weekly v. Morrow, 204 F.3d 613, 615 (5th Cir. *2000); Liedtke v. State Bar of* Tax.,18 F.3d 315, 317 (5th Cir. *1994); Matter of Rei!nazler,152* F.3d 341, 343 (5th Cir. 1988). Thus, Plaintiffs case must be dismissed for lack of subject matter jurisdiction. Accordingly, the Court issues the following Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Clerk's Doc. No. 8) is hereby GRANTED. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this case is CLOSED and all pending motions are denied as MOOT.

SIGNED AND ENTERED this 24th day of January, 2003.

Signed:
JAMES R. NOWLIN
CHIEF UNITED STATES
DISTRICT JUDGE

5B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 JA 28 PM 4:17
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN	§	
	§	
VS.	§	CIVIL NO.
	§	A-02-CA-614 JN
SUDHA VALLABHENI and	§	
US IMMIGRATION AND	§	
NATURALIZATION SERVICE	§	

FINAL JUDGMENT

Before the Court is the above entitled cause of action. Based on the Court's previous Order entered on this date, the Court enters the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED, ADJUDGED AND DECREED that this case is CLOSED and all pending motions are DENIED AS MOOT.

SIGNED AND ENTERED this 28TH day of January, 2003.

Signed:
JAMES R. NOWLIN
CHIEF UNITED STATES
DISTRICT JUDGE

6B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 FE 3 PM 3:46
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN	§	
	§	
VS.	§	CIVIL NO.
	§	A-02-CA-614 JN
SUDHA VALLABHENI and	§	
US IMMIGRATION AND	§	
NATURALIZATION SERVICE	§	

ORDER

Before the Court is Plaintiff's Motion to Strike Defendant Vallabhaneni's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Clerk's Doe. No. 19) filed January 30, 2003. This case was closed and all pending motions denied as moot on January 28, 2003. Thus, this motion is denied. Plaintiff should pursue any other perceived legal matters through the proper appellate channels. This case is closed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Strike Defendant Vallabhaneni's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Clerk's Doc. No. 19) is hereby DENIED.

SIGNED AND ENTERED this 3rd day of February, 2003.

Signed:
JAMES R. NOWLIN
CHIEF UNITED STATES
DISTRICT JUDGE

8B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION
2003 FE 18 AM 9:28
Western District of Texas
U.S. CLERK'S OFFICE
BY: initials
DEPUTY

APPARAJAN GANESAN	§	
	§	
VS.	§	CIVIL NO.
	§	A-02-CA-614 JN
SUDHA VALLABHENI and	§	
US IMMIGRATION AND	§	
NATURALIZATION SERVICE	§	

ORDER

Before the Court is Plaintiff's Motion to Reconsider Final Judgment (Clerk's Doc. No. 22) filed February 10, 2003. Despite the mail difficulties asserted by Plaintiff, the Court did not grant summary judgment for Defendant solely on the basis that Plaintiff had filed no response within 18 days of Defendant's filing of her Motion for Summary Judgment. The Court also had legal cause for disposing of Plaintiff's case. Accordingly, the Court issues the following Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Reconsider Final Judgment (Clerk's Doc. No. 22) is hereby DENIED. The

Court reiterates that any future motions filed in this case are denied as moot.

SIGNED AND ENTERED this 18th day of February, 2003.

Signed:
JAMES R. NOWLIN
CHIEF UNITED STATES
DISTRICT COURT

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New York Times

Sept. 19, 2003

MID-ATLANTIC

PENNSYLVANIA: A NO TO COMMON-LAW MARRIAGES A state appeals court abolished the doctrine of common-law marriage, saying that such informal arrangements, based only on an exchange of vows, are an anachronism born in an era when not everyone could afford or arrange a marriage ceremony. Two dissenting judges said the legislature, not the courts, should decide the question. The appeals court said that only 11 other states recognize the doctrine of common-law marriage. The State Supreme Court may review the decision.

Adam Lipedk (NYT)

[J-019-98]

THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

THEODORE STAUDENMAYER, Appellant	: No. 0101 M.D. Appeal Docket 1997
v.	: Appeal from the Order of Superior Court dated October 24, 1996 at No. 1126PHL96 affirming in part and reversing in part the Order of the Court of Common Pleas of Susquehanna County dated February 28, 1996 at No. 1992-505
LINDA STAUDENMAYER, Appellee	
	: ARGUED: February 2, 1998

OPINION

MADAME JUSTICE NEWMAN
DECIDED: JULY 23, 1998

This case presents the issue of whether the Superior Court erred when it reversed the trial court and found the existence of a common law marriage prior to a ceremonial marriage between the parties. We reverse and reinstate the trial court's conclusion that the parties were not married prior to their ceremonial marriage.

Theodore Staudenmayer (Theodore) and Linda Staudenmayer (Linda) were married in a civil ceremony

performed on December 16, 1984. The Staudenmayers had lived together since March of 1976 and cohabited continuously, except for one brief period, until their final separation in April of 1992. They have one daughter, who was born in March of 1979. Theodore filed for divorce on May 12, 1992, with the result being that there were equitable distribution proceedings.

The trial court held a hearing on January 22, 1996 regarding the equitable distribution of the marital estate. The most contentious issue concerned a structured tort settlement which Theodore received from a personal injury from a forklift accident that occurred sometime in 1982 or 1983. This tort claim was settled in April of 1984, and resulted in monthly payments to Theodore of six hundred dollars ($600.00), with a lump-sum payment of seventy thousand dollars ($70,000.00) on April 4, 2004. Theodore argued that this settlement did not constitute marital property because it occurred prior to the Staudenmayers' wedding in December of 1984. Linda claimed that the tort settlement was marital property because the Staudenmayers had a common law marriage as early as 1978.

In support of her assertion that she and Theodore had a common law marriage before the date of the tort claim, Linda testified that they maintained joint checking accounts as Linda and Theodore Staudenmayer in 1978. She further testified that she began using Staudenmayer as her last name in 1978, and that she changed her Social Security card, driver's license and credit cards at that time to identify her as Linda Staudenmayer. The deed to the Staudenmayers' marital residence in Franklin Township, which was dated August 4, 1978, was conveyed to "Theodore A. Staudenmayer and Linda L. Staudenmayer, his wife ...as Tenants by the Entirety." In addition, Linda testified that the

Staudenmayers filed federal income tax returns as "married, filing jointly," beginning in 1978.

On direct examination, Linda testified regarding the establishment of the common law marriage between her and Theodore:

Q. At any time prior to 1984, did you and Mr. Staudenmayer say to each other, we're married or anything to that effect?

A. Yes.

Q. When, do you remember?

A. Probably off and on all through the relationship.

Q. And initially, in 1978?

A. Mostly from 1978 on, he always introduced me as his wife and we just presented ourselves as a [sic] married people.

Q. Did you actually tell people that you were Mr. Staudenmayer's wife before 1984?

A. Yes.

Notes of Testimony, 1/22/96, at 30 – 31. Following this exchange, however, Linda was asked:

Q. What about members of your family?

A. Immediate members of my family?

Q. Yes, did you tell them that you were husband and wife?

A. I didn't tell my immediate family that we were married. Ted wanted me to present that to his parents.

Q. Did you?

A. I just left it to him.

N.T., 1/22/96 at 31.

During cross-examination, Linda admitted that she and Theodore had a civil marriage ceremony. She further admitted that she indicated on support papers filed in March of 1993 that the date of her marriage was December 14, 1985,[1] and, in response to a question concerning her marital status at the time of her daughter's birth, she wrote "not married." Regarding the change of her name on her credit cards, driver's license, and Social Security card, Linda admitted that Theodore was not required to sign anything to authorize the change, nor did he do so, but stated that "he requested that I do so." Theodore's attorney then attempted to impeach Linda with questions concerning when she first asserted the existence of a common law marriage, suggesting that she did not raise the issue post-separation until after Theodore claimed that the structured tort settlement was not marital property. Although Theodore's attorney did not directly ask Linda why she had a civil marriage ceremony in

[1] Linda testified at the hearing that the date of the ceremony was December 14, 1985, but the date of the ceremonial marriage pled in Theodore's complaint, and used by Linda's attorney in briefs on the issue, was December 16, 1984.

1984 if she believed she was already married, Linda testified on redirect examination as follows:

Q. Mrs. Staudenmayer, you referred to the ceremonial date in 1984 as the legal date.

A. Okay.

Q. What do you mean by that?

A. I don't know, the date for legal purposes, I suppose.

Q. But that date has no more significance to you than any date prior to when you and Mr. Staudenmayer lived together?

A. No.

N.T., 1/22/96 at 58.

In an Opinion and Order filed on February 28, 1996, the trial court declared the structured tort settlement to be non-marital property. The court concluded that Linda, as the one alleging a common law marriage, failed to prove "clearly and convincingly" that she and Theodore had exchanged *verba in praesenti*, the present exchange of words uttered for the purpose of establishing the relationship of husband and wife. The court also found that Linda failed to establish, clearly and convincingly, that she and Theodore had a reputation of marriage which is broad and general, and specifically cited Linda's admission that she had not told her immediate family that she and Theodore were married during the time of her purported common law marriage. Accordingly, the court held that the Staudenmayers were not married until their ceremonial marriage in 1984, and that the structured tort

settlement, which accrued to Theodore prior to that time, was not part of the marital estate.

The Superior Court reversed the trial court with respect to the structured tort settlement.[2] Contrary to the findings of the trial court, the Superior Court concluded that Linda had established by clear and convincing evidence that she and Theodore were married sometime before the structured tort settlement, and the trial court abused its discretion in holding otherwise. Although noting the inconsistencies in Linda's testimony, the Superior Court found these not "fatal" to Linda's burden, in light of the "numerous, objective indicia of marriage." Slip Opinion, p. 5. We granted allocatur to clarify the burden for proving a common law marriage.

Marriage in Pennsylvania is a civil contract by which a man and a woman take each other for husband and wife. *In re Estate of Manfredi*, 399 Pa. 285, 291, 159 A.2d 697, 700 (1960). There are two kinds of marriage: (1) ceremonial; and (2) common law. *Id.* A ceremonial marriage is a wedding or marriage performed by a religious or civil authority with the usual or customary ceremony or formalities. *Id. See* 23 Pa.C.S. § 1501, *et seq.*

Because claims for the existence of a marriage in the absence of a certified ceremonial marriage present a "fruitful source of perjury and fraud," Pennsylvania courts have long viewed such claims with hostility. *See In re Estate of Wagner*, 398 Pa. 531, 533, 159 A.2d 495, 497 (1960). Common law marriages are tolerated, but not encouraged.

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[2] The Superior Court otherwise affirmed the trial court's equitable distribution scheme, and the sole issue in this appeal concerns the finding of a common law marriage.

Id. While we do not today abolish common law marriages in Pennsylvania,[3] we reaffirm that claims for this type of marriage are disfavored.[4]

---

[3] Pennsylvania is among the minority of states that continue to recognize common law marriages. The following are the additional states that recognize common law marriages: (**Alabama**) *Stringer v. Stringer*, 689 So.2d 194 (Ala. Civ. App. 1997); (**Colorodo**) *In re Marriage of Cargill*, 843 P.2d 1335 (Co. 1993); (**District of Columbia**) *Coates v. Watts*, 622 A.2d 25 (D.C. 1993); (**Iowa**) *Conklin v. MacMillan Oil Co.*, 557 N.W.2d 102 (Iowa Ct. App. 1996); (**Kansas**) *Dixon v. Certainteed Corp.*, 915 F.Supp. 1158 (D. Kan. 1996); (**Montana**) *Matter of Estate of Alcorn*, 868 P.2d 629 (Mont. 1994); (**New Hampshire**) *In re Buttrick*, 597 A.2d 74 (N.H. 1991) (for inheritance purposes only); (**Oklahoma**) *Matter of Estate of Carroll*, 749 P.2d 571 (Okla. Ct. App. 1987); (**Rhode Island**) *Petrarca v. Castrovillari*, 448 A.2d 1286 (R.I. 1982); (**South Carolina**) *Barker v. Barker*, 1998 WL 120210 (S.C. Ct. App. March 9, 1998); (**Texas**) *Russell v. Russell*, 865 S.W.2d 929 (Tex. 1993); (**Utah**) *Whyte v. Blair*, 885 P.2d 791 (Utah 1994).

[4] Justice Nigro's Concurring Opinion correctly notes the number of jurisdictions that no longer recognize the doctrine of common law marriage. Indeed, the doctrine's continued viability is seriously in question. In the instant case, however, the appellant never raised the validity of the common-law marriage doctrine as an issue, and it would be inappropriate for us to address that question presently.

A common law marriage[5] can only be created by an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of husband and wife is created by that. *Commonwealth v. Gorby*, 527 Pa. 98, 110, 588 A.2d 902, 907 (1991). Regarding this requirement for an exchange of words in the present tense, this Court has noted:

> [I]t is too often forgotten that a common law marriage is a marriage by the express agreement of the parties without ceremony, and almost invariably without a witness, by words – not in futuro or in postea, but – in praesenti, uttered with a view and for the purpose of establishing the relationship of husband and wife.

Estate of Manfredi, 399 Pa. at 291, 159 A.2d at 700 (citations omitted). The common law marriage contract does not require any specific form of words, and all that is essential is proof of an agreement to enter into the legal relationship of marriage at the present time. *Estate of Gavula*, 490 Pa. 535, 540, 417 A.2d 168, 171 (1980).

The burden to prove the marriage is on the party alleging a marriage, and we have described this as a "heavy" burden where there is an allegation of a common law marriage. Id.

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[5] Black's defines "common law marriage" as: One not solemnized in the ordinary way (i.e., non-ceremonial) but created by an agreement to marry, followed by cohabitation. A consummated agreement to marry between persons legally capable of making marriage contract, per *verba de* praesenti, followed by cohabitation. Such marriage requires a positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationship of men and wife, and an assumption of marital duties and obligations.

Black's Law Dictionary 251 (6th ed. 1979).

at 540, 417 A.2d at 171. When an attempt is made to establish a marriage without the usual formalities, the claim must be reviewed with "great scrutiny." Id. at 541, 417 A.2d at 171.

Generally, words in the present tense are required to prove common law marriage. *Estate of Wagner*, 398 Pa. at 535 – 36, 159 A.2d at 498. Because common law marriage cases arose most frequently because of claims for a putative surviving spouse's share of an estate,[6] however, we developed a rebuttable presumption in favor of a common law marriage where there is an absence of testimony[7] regarding the exchange of *verba in praesenti*. When applicable, the party claiming a common law marriage who proves: (1) constant cohabitation; and, (2) a reputation of marriage "which is not partial or divided but is broad and general," raises the rebuttable presumption of marriage. *See Estate of Manfredi*, 399 Pa. at 291, 159 A.2d at 700. Constant cohabitation, however, "even when conjoined with general reputation are not marriage, they are merely circumstances which give rise to a rebuttable presumption of marriage." *Id.*

---

[6] *See, e.g., Estate of Gavula, supra; Estate of Wagner, supra; Nikitka's Estate*, 346 Pa.63, 29 A.2d 521 (1943). *See also Estate of Manfredi, supra* (plaintiff sought to establish legitimacy of her birth through claim of her parents' common law marriage in order to share in putative uncle's estate).

[7] The Dead Man's Act, 42 Pa.C.S. § 5930, presented a significant problem in this respect. *See Estate of Wagner*, 398 Pa. at 536, 159 A.2d at 498. *See also* discussion of *In re Estate of Stauffer*, 504 Pa. 626, 476 A.2d 354 (1984), *infra*.

Here, however, we are presented with the problem of whether this rebuttable presumption pertains when both parties are alive and able to testify regarding the formation of the marriage contract. We have stated that "the rule which permits a finding of marriage duly entered into based upon reputation and cohabitation alone is one of necessity to be applied only in cases where other proof is not available." *In re Nikitka's Estate*, 346 Pa. 63, 65, 29 A.2d 521, 522 (1943). The "necessity" that would require the introduction of evidence concerning cohabitation and reputation of marriage is the inability to present direct testimony regarding the exchange of *verba in praesenti*. We held in *In re Estate of Stauffer*, 504 Pa. 626, 476 A.2d 354 (1984), that the Dead Man's Act prohibited the purported wife's testimony regarding the exchange of marital vows with her alleged common law husband. There, we noted that the inability of the putative widow to present any testimony regarding the exchange of vows did not prevent her from proving a common law marriage. "Where there is no such proof available," we held, "the law permits a finding of marriage based upon reputation and cohabitation when established by satisfactory proof." *Id* at 632, 476 A.2d at 357.

We have not, however, dispensed with the rule that a common law marriage does not come into existence unless the parties uttered the *verba in praesenti*, the exchange of words in the present tense for the purpose of establishing the relationship of husband and wife. *See Commonwealth v. Wilson*, 543 Pa. 429, ___, 672 A.2d 293, 301 (1996) (discussing common law marriage in context of a claim of spousal testimonial immunity). We have allowed, as a remedial measure, a rebuttable presumption in favor of a common law marriage based on sufficient proof of cohabitation and reputation of marriage where the parties are otherwise disabled from testifying regarding *verba in*

praesenti. However, where the parties are available to testify regarding *verba in praesenti*, the burden rests with the party claiming a common law marriage to produce clear and convincing evidence of the exchange of words in the present tense spoken with the purpose of establishing the relationship of husband and wife, in other words, the marriage contract. In those situations, the rebuttable presumption in favor of a common law marriage upon sufficient proof of constant cohabitation and reputation for marriage, does not arise.

By requiring proof of *verba in praesenti* where both parties are able to testify, we do not discount the relevance of evidence of constant cohabitation and reputation of marriage. When faced with contradictory testimony regarding *verba in praesenti*, the party claiming a common law marriage may introduce evidence of constant cohabitation and reputation of marriage in support of his or her claim. We merely hold that if a putative spouse who is able to testify and fails to prove, by clear and convincing evidence, the establishment of the marriage contract through the exchange of *verba in praesenti*, then that party has not met its "heavy" burden to prove a common law marriage, since he or she does not enjoy any presumption based on evidence of constant cohabitation and reputation of marriage.[8] *See Pierce v. Pierce*, 355 Pa. 175, 181, 49 A.2d 346, 349 (1946) ("[p]roof of reputation

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[8] Even in circumstances where the rebuttable presumption in favor of a common law marriage applies, i.e., where testimony regarding the exchange of *verba in praesenti* is not available to the party claiming a common law marriage, we question the utility of constant cohabitation as an element of that presumption. Cohabitation between unmarried people today does not carry with it the same social taboo as when the common law marriage doctrine was developed, and is perhaps less indicative of an intent by a man and a woman to be husband and wife than it was fifty or one hundred years ago.

and cohabitation could not establish marriage; nor, in the absence of evidence regarding a marriage contract, is it sufficient to warrant a presumption of marital relations").

Here, we are mindful that the trial court in equitable distribution proceedings, as factfinder, makes determinations concerning the credibility of witnesses and that its conclusions of law based on those determinations will not be disturbed absent an abuse of discretion. *See Brown v. Brown*, 447 Pa. Super. 424, 669 A.2d 969 (1995), *aff'd*, 547 Pa. 360, 690 A.2d 700 (1997). We cannot conclude, based on a review of the record, that the trial court abused its discretion when it determined that Linda failed to prove clearly and convincingly, the existence of the common law marriage contract between her and Theodore. She was unable to recall the specific instance of when she and Theodore said to each other, "we are husband and wife." She admitted that she and Theodore were married in a civil ceremony in 1984, and offered no explanation as to why she thought this civil ceremony necessary. Theodore's counsel sufficiently impeached her on cross-examination regarding the timing of her assertion of a common law marriage, suggesting that she did not raise the issue until it became apparent that Theodore claimed that the structured tort settlement was non-marital property. Her claim of common law marital status in 1978 contradicts her admission that, in the support papers filed in 1993, she indicated that she was "not married" at the time of her daughter's birth. The record as a whole, therefore, supports the trial court's conclusion that Linda's testimony on this issue lacked credibility, and that she failed to prove, by clear and convincing evidence, the establishment of a common law marriage through the exchange of *verba in praesenti* between her and Theodore.

Nor, in accordance with our holding today, do we find that Linda was entitled to any rebuttable presumption in favor of a common law marriage through evidence of constant cohabitation and reputation of marriage. As we have stated, that rebuttable presumption applies only when testimony regarding the exchange of *verba in praesenti* is unavailable. *See Estate of Stauffer, supra; Estate of Wagner, supra.* Here, Linda was available to testify, and did testify, concerning the exchange of *verba in praesenti* between her and Theodore. She simply did not do so convincingly, and therefore did not meet her burden.[9]

Accordingly, we reverse the decision of the Superior Court and reinstate the trial court's equitable distribution award.

Mr. Justice Saylor did not participate in the consideration or decision of this case.

Mr. Justice Nigro files a concurring opinion in which Mr. Justice Castille joins.

Mr. Justice Zappala concurs in the result.

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[9]The deed to the residence provided some independent corroborative evidence of Linda's claim, but it is only circumstantial evidence in support of that claim. The deed is not a marriage contract; it is a contract for the conveyance of land. The remainder of her proof of the existence of the common law marriage rested entirely on the credibility of her own testimony at the hearing. Therefore, even if the rebutable presumption in favor of common law marriage applied, Linda failed to provide sufficient evidence to raise it. She adduced no testimony from anyone in the Staudenmayer's community to show that they had a general reputation for marriage, and she admitted that she never told her immediate family of her supposed common law marriage.

[J-019-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

THEODORE STAUDENMAYER, Appellant	: No. 0101 M.D. Appeal Docket 1997
v.	: Appeal from the Order of Superior Court dated October 24, 1996 at No. 1126PHL96 affirming in part and reversing in part the Order of the Court of Common Pleas of Susquehanna County dated February 28, 1996 at No. 1992-505
LINDA STAUDENMAYER, Appellee	
	: ARGUED: February 2, 1998

CONCURRING OPINION

MR. JUSTICE NIGRO **DECIDED: JULY 23, 1998**

I concur in the Majority Opinion. However, I would go one step further and advocate the abolition of common law marriage in this Commonwealth, thereby joining the majority of jurisdictions which have recognized the inappropriateness of such an ancient convention in modern times.[10]

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[10] E.g., the following states are among those which had recognized common law marriage and have since abolished it: California (1895); Illinois (1905); Wisconsin (1917); Missouri (1921); Nebraska (1923); New York (1933); New Jersey (1939); Minnesota (1941); Nevada (1942); Mississippi (1956); Michigan (1957); South Dakota (1959); Florida (1968); Indiana (1986).

I commend to the attention of the Majority the language of the judiciary of sister states urging the abolition of common law marriage.

For example, in the District of Columbia:

> [S]uch a status is the product of an antiquated law and inattention to whether there is a need for a change. We . . . question whether such an informal and almost uniformly misunderstood status should not be abolished to end creation of such relationships in the future. The considerations which history teaches gave rise to judicial recognition of such informal and unrecorded marital agreements can hardly justify modern day perpetuation. Cost is certainly not prohibitory, and a plethora of public and quasi-public officials are available to solemnize such an important and socially significant occasion. Certainly no one would contend that facilities for recordation are unavailable. Indeed, one might question whether any valid reason exists to encourage and sanction future circumvention of the established and salutary system for formalizing and recording marriages.

Johnson v. Young, 372 A.2d 992, 995-96 (D.C. 1977) (citing *McCoy v. District of Columbia*, 256 A.2d 908, 910 (D.C. 1969).

In Arkansas, the Supreme Court noted that:

> The pioneer conditions which fostered common-law marriage in the United States have disappeared . . . . The clerk's office is available to all, and none are beyond the sound of church bells. If reason be the life of the law it would appear wise to abolish

> common-law marriage everywhere in the United States by individual action in the several states in which it still enjoys a tenuous hold, for its continuance seems to promise more abuse than use.

Osburne et al. v. Graves, 213 Ark. 727, 732, 210 S.W.2d 496, 498 (1948).

And in Ohio:

> The days of the walking preacher and of the bishop on horseback are long gone. As was stated in *In re Estate of Maynard*, . . .: 'Is it not an amazing fact, that, in a matter which so profoundly affects the dignity and stability of a family institution, society would be slow to take enlightened action? Surely, no legislative reform is more needed than clear and positive statutes declaring such loosely contracted unions null and void.'

Nestor v. Nestor, 15 Ohio St. 3d 143, 149-50, 472 N.E.2d 1091, 1097 (1984)(Brown, J., dissenting).

More recently, New Jersey reiterated the underlying rationale for the abolishment of common-law marriage:

> Inherent in the common law marriage are a non-recognition of the legal process, and a lack of commitment which often gives rise to an impermanent and ephemeral arrangement, such that economic support, let alone dependency, may be withheld randomly. The union, which in the eyes of the public remains an uncertainty, may dissolve at any time.

Dunphy v. Gregor, 136 N.J. 99, 120, 642 A.2d 372, 382 (1994).

And, New York reminded us of the impetus behind its abolishment of common law marriage more than six decades ago:

> The consensus was that while the doctrine of common law marriage could work substantial justice in certain cases, there was no built-in method for distinguishing between valid and specious claims and, thus, that the doctrine served the state poorly.

Monroe v. Monroe, 50 N.Y.2d 481, 489, 413 N.E.2d 1154, 1157 (1980).

Thus, as marriage is necessarily an affirmative act, and ancient impediments no longer pertain, I would advocate the abolishment of common law marriage in Pennsylvania so that official records, and not the courts, may determine if and when the parties were married.

Mr. Justice Castille joins in this Concurring Opinion.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PNC Bank Corporation, Petitioner	:	
v.	:	:No. 860 C.D. 2002
	:	:Argued:
	:	October 9, 2002
Workers' Compensation Appeal Board (Stamos), Respondent	:	

BEFORE:
HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENEE L. COHN, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION BY
JUDGE LEADBETTER **FILED:** September 17, 2003

In this appeal we are called upon to address the issue left open by our Supreme Court in *Staudenmayer v. Staudenmayer,* 552 Pa. 253, 714 A.2d 1016 (1998), to wit: the continued viability of the doctrine of common law marriage. PNC Corporation (PNC), employer of decedent, Janet Stamos, appeals the order of the Workers'

Compensation Appeal Board (Board), affirming the grant of John Kretz's fatal claim petition after concluding that the Workers' Compensation Judge (WCJ) properly concluded that Kretz was the common law spouse of Stamos. PNC argues both that the doctrine of common law marriage ought to be abandoned, and that even if it is not, Kretz failed to meet the heavy burden of proof required to establish such a union. For the reasons that follow, we hold that the time has come to abolish the doctrine, but that this decision should be given purely prospective effect. Because we further conclude that there was substantial evidence to support the findings of fact upon which the WCJ rested her decision, we affirm the order of the Board.

In 1997, Kretz filed a fatal claim petition alleging that he was the common law spouse of Stamos, who died in an airplane crash in 1994 while working for employer. The nature of Kretz's relationship with Stamos was the subject of the hearings that followed before the WCJ. In Pennsylvania, "a common law marriage can only be created by the exchange of words in the present tense *[`verba in praesenti'],* spoken with the specific purpose that the legal relationship of husband and wife is created by that." *Staudenmayer,* 552 Pa. at 261-62, 714 A.2d at 1020 (footnote omitted).[1] In order to establish the requisite *verba de praesenti,* Kretz submitted into evidence a document entitled, "Affidavit of Eligible Member of Iron Workers Benefit Plans of Western

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[1] This rule applies when parties are available to testify regarding the exchange of words. If the parties are not available, a rebuttable presumption in favor of common law marriage is allowed where there is sufficient proof of cohabitation and reputation of marriage in the community. *Staudenmayer,* 552 Pa. at 264, 714 A.2d at 1021.

Pennsylvania Common Law Spouse."[2] The affidavit stated, in pertinent part:

> I, John A. Kretz, in support of my request to include my spouse, Janet Stamos, as a beneficiary under the Iron Workers Welfare Plan of Western Pennsylvania, Iron Workers Pension Plan of Western Pennsylvania, and Iron Workers Local No. 3 Annuity Plan, aver that on or about the 15th day of June, 1988, we, the undersigned, having the capacity to marry, did unite ourselves in marriage through the mutual exchange of words which expressed our present intent to live together as husband and wife; and further, since the aforementioned dated [sic] we have openly lived together as husband and wife, and are so accepted by our family, friends and community.
>
> By signing this affidavit, I understand that my spouse will be legally eligible for any pension and/or annuity benefits upon my death. I also understand that my spouse must now sign and agree to any withdrawals from my pension and/or annuity plans. I also understand that in order to remove my spouse from my coverage, I must obtain a legal divorce.

Hearing of July 23, 1997, Claimant's exhibit 1. Both Kretz and Stamos signed the affidavit on December 22, 1990 and their signatures were notarized.

Kretz also testified to the circumstances surrounding the execution of the affidavit. According to Kretz, the couple signed the affidavit because they were consolidating their

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[2] The affidavit is a preprinted form with spaces for the member to provide his or her name, the spouse's name, the date of marriage and both parties' signatures.

benefits and insurances and he wanted to insure that if anything happened to him, his assets would go to Stamos.

Kretz testified that prior to signing the affidavit, he and Stamos discussed the date of their marriage in order to pick the date of their anniversary. He admitted, however, that he meant to indicate on the affidavit that their marriage occurred in 1989 rather than 1988 and that the 1988 date was a mistake.[3] Kretz also testified that he and Stamos began living together in June of 1989 and that they subsequently exchanged rings as a sign of their marriage. Kretz stated that their marriage was not taken lightly.

With respect to title to their property, Kretz testified that they did not have any jointly owned assets or debts. Although the couple was mutually dependent upon each other financially, they maintained separate bank accounts and the mortgage and deed to the couple's house, which was purchased in 1990, were in Stamos' name only. He also noted that they filed separate tax returns. In addition, Kretz offered into evidence credit card statements, cancelled checks and receipts to demonstrate the various activities and vacations that the couple took together. He also offered into evidence various sympathy cards that referred to Stamos as his wife.[4] Kretz testified that following Stamos' death, he was the main point of contact between the family and airline.

Kretz also presented the deposition testimony of Boe Gillespie, the Administrative Manager of the Iron Workers Plans of Western Pennsylvania. According to Gillespie,

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[3] Stamos was married to another man until December of 1988.

[4] Those documents were objected to on various grounds such as relevancy and hearsay.

once the common law spouse affidavit is executed, the participant cannot remove the spouse from coverage unless a divorce is obtained. In addition, a plan representative counsels participants regarding the import of executing the affidavit. Finally, employer offered into evidence Stamos' death certificate, which indicated that she was divorced and had no surviving spouse at the time of her death.

The WCJ found that:

> The evidence establishes *verba de praesenti* between John Kretz and Janet Stamos. Submitted into evidence was the [Affidavit] completed December]. The document sets forth that "we, the undersigned, having the capacity to marry, did unite ourselves in marriage through the mutual exchange of words which expressed our present intent to live together as husband and wife; and further, since the aforementioned date we have openly lived together as husband and wife, and are so accepted by our family, friends and community." While it may be suggested that the designation is only to provide health benefits not otherwise available to a non-spouse, the completion of the form entitles the "spouse to a marital interest in Pension and Annuity Plans. Once completed, the husband and wife status remains and requires spousal approval, via signature, for any withdrawals from the pension and/or annuity plans.
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> ...
>
> The testimony of Mr. Kretz, and the common law spouse affidavit clearly establish that the parties had completed the verba de praesenti, the present intention to marry, required to establish a common law marriage. The parties set forth on December 22,

> 1990 the written words of their present intention to be married, had their written intention notarized at a magistrate's office. They discussed the date they desired to be their marriage date for their upcoming two year anniversary. Although the date listed on the form incorrectly listed June 15, 1988 instead of June 15, 1989, the parties executed the document setting forth their present intention to be married on December 22, 1990. There did not exist any impediment to the parties' marriage as of 1989 and therefore, clear and convincing evidence exists that the parties had repeated their verba de praesenti on December 22, 1990.

Kretz v. PNC Bank Corp., Bureau Claim No. 983729, slip op. at 2-4 (WCJ's decision and order, April 28, 2000) (Findings of fact nos. 8 and 12). Based upon her finding that Kretz was married *via* common law marriage to Stamos at the time of her death, the WCJ concluded that Kretz was entitled to surviving spouse's benefits. On appeal, the Board affirmed.[5]

Relying on our Supreme Court's clearly articulated skepticism in *Staudenmayer* regarding the continued viability of the common law marriage doctrine in Pennsylvania, employer asks this court to abolish the doctrine as antiquated and lacking any valid purpose in today's society. Employer is correct that the Supreme Court has clearly stated its disapproval of the doctrine.

As the Supreme Court noted in *Staudenmayer*, a marriage is a "civil contract by which a man and woman take each other for husband and wife." 552 A.2d at 260, 714 A.2d at

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[5] The Board initially remanded to the WCJ so that Boe Gillespie's deposition transcript could be made a part of the record.

1019. Two forms of marriage are recognized in Pennsylvania, namely, ceremonial, which involves a marriage performed by a religious or civil authority with the usual ceremony or formalities, and common law. *Id.* at 260-61, 714 A.2d at 1019. Notwithstanding the provision in Section 1301 of the 1990 Marriage Law (Law)[6] that "[n]o person shall be joined in marriage in this Commonwealth until a marriage license has been obtained," the Law explicitly left unchanged the judicially-created doctrine of common law marriage. 23 Pa. C.S. § 1103. Pennsylvania, however, is one of the minority of states that continue to recognize common law marriages. See Staudenmayer, 552 Pa. at 261 n.3, 714 A.2d at 1020 n.3 (listing the 11 other states that recognize common law marriages).

The doctrine of common law marriage was recognized by the United States Supreme Court as early as 1877, see Meister v. Moore, 96 U.S. 76 (1877), and by the Pennsylvania Supreme Court as early as 1873, see Richard v. Brehm, 73 Pa. 140 (1873). Despite the well-established history of the doctrine, different views exist regarding its origins. In A Feminist Proposal to Bring Back Common Law Marriage, 75 Or. L. Rev. 709 (1996), Cynthia Grant Bowman provides an extensive historical review of common law marriages. According to Bowman's research, common law marriage in the United States stems from the informal marriages common in Europe prior to the Reformation. *Id.* at 718. Apart from the nobility or wealthy, marriages were entered into without formality whereby a couple, perhaps in the presence of family members, would agree to be married and then begin living together as husband and wife. *Id.* Further, in the early Roman Catholic Church, marriage was viewed as a private contract based

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[6] 23 Pa. C.S. §§ 1101-1905.

upon natural law. *Id.* Informal marriage continued to be recognized in England until 1753 when Parliament passed Lord Hardwicke's Act, which provided that only marriages performed by ministers of the Church of England would be recognized as valid. *Id.* at 719.

The migration of the English to the American colonies brought the practice of common law marriages to the United States. Two traditions followed: one view enacted legislation regulating marriage and abrogating the common law tradition and the other view continued to embrace the tradition received from English common law. For instance, the colonies that were settled by dissenters of the Church of England, such as Massachusetts, rejected canon law (and thereby common law marriage), adopting instead statutes and regulations as early as 1639 that required formal marriage ceremonies performed by designated officials. *Id.* Other colonies that were settled prior to Lord Hardwicke's Act continued the tradition of informal marriages found in English common law, simply assuming that such marriages continued to be valid. *Id.* at 719-20. In *Fenton v. Reed, 4* Johns 52 (1809), the New York Supreme Court held that a contract of marriage made *per verba praesenti* constitutes a valid marriage.

Bowman opines that as settlement in America moved westward, common law marriages existed due to necessity. The country was sparsely populated and travel difficult such that it was often difficult to have access to officials or clergy. *Id.* at 722.[7] In *Wifely Behavior: A Legal History of*

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[7]Although a review of the full history of the early treatment of common law marriage in this country is not necessary, we note that Bowman's article also discusses the varying views found in states settled by French colonists, Spanish colonists and states with large Native American populations.

Acting Married, 100 Colum. L. Rev. 957 (2000), Ariela R. Dubler proffers a different view of the creation of the doctrine:

The vast majority of cases in which courts across jurisdictions pondered the validity and desirability of common law marriage shared a common sociological backdrop: female economic dependency. Almost all common law marriage cases involved women in need of financial support, and most were initiated by female plaintiffs. In many cases, a woman whose long-term domestic partner had died or deserted her came to court seeking judicial recognition of her terminated relationship as marital to enable her to inherit as a widow or to seek support as an abandoned wife. In other cases, one town brought suit against another town to determine which jurisdiction was responsible for the support of an indigent woman. Such "settlement cases" afforded the town in which the poor woman resided an opportunity to transfer the burden of her support to another town by declaring her the common law wife of a male resident of that other town.

The doctrine of common law marriage provided judges with a way to privatize the financial dependency of economically unstable women plaintiffs. By declaring a woman to be a man's wife or widow at common law, courts shielded the public from the potential claims of needy women, effectively deflecting those claims inward to a particular private, family unit. In addition, holding a couple married at common law avoided branding their children with the legal status of illegitimacy. Moreover, common law marriage served another purpose: The doctrine allowed judges to efface the potentially threatening nature of nonmarital domestic relationships by labeling them marriages. Common law marriage thus transformed

potentially subversive relationships- subversive in their disregard for the social and legal institution of marriage-into completely traditional relationships. In recognizing common law marriages, therefore, courts reinforced the supremacy of the institution of marriage by demonstrating that it could subsume under its aegis almost all long-term domestic forms of ordering. *Id.* at 968-69 (footnotes omitted)[8]

According to Bowman, the first wave to abolish common law marriage in states recognizing it occurred between 1875 and 1917. 75 Or. L. Rev. at 731. The theories supporting criticism of and abolishment of the doctrine relate to: (1) urbanization and industrialization, which led to improved transportation and greater access to civil authorities, thereby removing many of the bars to a formal marriage; (2) increased wealth in private hands, which led to concerns of protecting inheritances from fraudulent claims and transmission of wealth to legitimate heirs; (3) increased emphasis on protecting the institution of marriage and viewing marriage as the "model and foundation of society and government;" and (4) racism, which led to the view that slaves, as property, lacked the capacity to enter into contracts, and sought to prevent interracial marriages. *Id.* at 731-46. While similar concerns motivated states to abolish the doctrine after 1920, the creation of new government benefit programs in the latter part of the twentieth century caused a new concern regarding the administrative burden required to sort through claims for benefits conditioned upon a marital relationship. *Id.* at 746-48.

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[8] *In re Estate of Soeder*, 220 N.E.2d 547 (Ohio Ct. App. 1966), also provides a good historical discussion of the doctrine.

Judicial criticism of the doctrine is abundant. In *Hewitt v. Hewitt,* 394 N.E.2d 1204 (Ill. 1979), the Illinois Supreme Court noted:

> "Despite its judicial acceptance in many states, the doctrine of common-law marriage is generally frowned on in this country, even in some of the states that have accepted it."(52 Am. Jur. 2d 902 Marriage sec. 46 (1970).) Its origins, early history and problems are detailed in *In re Estate of Soeder* (1966), 7 Ohio App.2d 271, 220 N.E.2d 547, where that court noted that some 30 States did not authorize common law marriage. Judicial criticism has been widespread even in States recognizing the relationship. *(See, e.g., Baker v. Mitchell* (1941), 143 Pa. Super. 50, 54, 17 A.2d 738, 741, "a fruitful source of perjury and fraud . . ."; *Sorenson v. Sorenson* (1904), 68 Neb. 500, 100 N.W. 930.) "It tends to weaken the public estimate of the sanctity of the marriage relation. It puts in doubt the certainty of the rights of inheritance. It opens the door to false pretenses of marriage and the imposition on estates of suppositious heirs." 7 Ohio App.2d 271, 290, 220 N.E.2d 547, 561.

Id. at 1211. Similarly, in McCoy *v. District of Columbia,* 256 A.2d 908 (App. D.C. 1969), the District of Columbia Court of Appeals opined:

> [T]here is no statute in the District of Columbia on the subject of common law marriage. Accordingly, such a status is the product of an antiquated law and inattention to whether there is a need for a change. It cannot be gainsaid that few people really understand

> that such a marriage requires more than mere cohabitation coupled with adoption of the `husband's' surname. Certainly most of those who live together in such a relationship lack any understanding of all the ingredients and permanency of such marriages. Indeed, experience reveals that many who believe themselves to be `common-law' married have had one or more previous `common-law' relationships without the benefit of divorce.
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> We commend to the attention of Congress the question whether such an informal and almost uniformly misunderstood status should not be abolished to end creation of such relationships in the future. The considerations which history teaches gave rise to judicial recognition of such informal and unrecorded marital agreements can hardly justify modern day perpetuation. Cost is certainly not prohibitory, and a plethora of public and quasipublic officials are available to solemnize such an important and socially significant occasion. Certainly, no one would contend that facilities for recordation are unavailable. Indeed, one might question whether any valid reason exists to encourage and sanction future circumvention of the established and salutary system for formalizing and recording marriages.

Id. at 910 (citations and footnotes omitted). And, in recognizing that N.J.S. 37:1-10 abolished common law marriage, the Supreme Court of New Jersey stated:

> It was not without reason that our statute and similar statutes in other states have been popularly referred to as "Heart Balm Acts." The many abuses

> arising from common law marriages, with their effect on public morality, private property rights and the legitimacy of children, called for correction. Our Legislature dealt with such mischiefs in this act in sweeping and emphatic language, permitting no exception or evasion....

Dacunzo v. Edgye, 117 A.2d 508, 514 (N.J. 1955).

Criticism of the doctrine in Pennsylvania is long standing as well. In *Buradus v. General Cement Products Co.,* 48 A.2d 883 (Pa. Super 1946), *aff'd,* 356 Pa. 349, 52 A.2d 205 (1947), the Pennsylvania Superior Court opined:

> There has been a growing judicial impatience of the invitation to perjury in cases depending for recovery on marriage at common law and a progressive change in judicial view requiring higher degrees of proof where such marriages are asserted.... But it is still not difficult for unprincipled claimants to convert illicit relationships into honest marriages, to their advantage, on spurious claims for workmen's compensation or against the estate of a decedent....
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> Marriage without civil or religious ceremony (perhaps mistakenly accepted here, as the then common law of England ...) is still valid, under the common law of Pennsylvania. And although, with the ready means of transportation everywhere available, common-law marriage may be an anachronism in the present dayborn as it was of the exigencies of pioneer life-we have not presumed to question it as an institution sanctioned by our law.

Id. at 884-85 (citations omitted). In *In re Estate of Manfredi,* 399 Pa. 285, 159 A.2d 697 (1960), our Supreme Court opined:

> [T]he law, or necessity, imposes a heavy burden on one who grounds his claim on an allegation of common law marriage. As said by President Judge Keller in *Baker v. Mitchell,* [17 A.2d 738, 741 (Pa. Super. 1941)]: "The law of Pennsylvania recognizes common law marriages. But they are a fruitful source of perjury and fraud, and, in consequence, they are to be tolerated, not encouraged; the professed contract should be examined with great scrutiny, and it should plainly appear that there was an actual agreement entered into, then and there, to form the legal relation of husband and wife."...

399 Pa. at 292, 159 A.2d at 700-01.

Most recently, in *Staudenmayer,* our Supreme Court in a plurality opinion reiterated the oft stated criticism, implying that the time had come to abolish the doctrine in this Commonwealth.[9] Justice Newman, who was joined by Chief

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[9] In *Staudenmayer,* the Supreme Court was presented with the issue of whether a couple had entered into a common law marriage prior to their ceremonial marriage taking place. Determination of the date of the parties' marriage was critical to the equitable distribution of the parties' marital estate as the husband received a large tort settlement while the parties were cohabiting but before their ceremonial marriage. The evidence demonstrated that the parties had cohabited together since 1976, had a daughter in 1979 and were married in a civil ceremony in 1984. Wife claimed that the parties entered into a common law marriage in 1978. In support of her claim, wife testified that in 1978, the couple maintained a joint checking account, she began using her husband's surname of Staudenmayer, she changed her social security

(Footnote continued on next page...)

Justice Flaherty and [now Chief] Justice Cappy, noted that Pennsylvania is currently among the minority of states that recognize common law marriages and opined that:

> Because claims for the existence of a marriage in the absence of a certified ceremonial marriage present a "fruitful source of perjury and fraud," Pennsylvania courts have long viewed such claims with hostility. Common law marriages are tolerated, but not encouraged. While we do not today abolish common law marriages in Pennsylvania, we reaffirm that claims for this type of marriage are disfavored.

Id. at 261, 714 A.2d at 1019-20 (citations and footnotes omitted). The Court further commented that the doctrine's "continued viability is seriously in question."[10] but declined to consider its abolishment because the parties had not raised the issue. Justice Nigro, in a concurring opinion

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(continued...)

card, driver's license and credit cards to identify her as Linda Staudenmayer, and the couple began filing joint tax returns. The evidence also reflected that wife reported the date of her marriage as 1985 in paperwork seeking support and that when the couple's daughter was born, wife wrote that she was "not married" in response to a question regarding her marital status. Finally, when asked when the couple expressed to each other their intent to marry, wife answered, "Probably off and on all through the relationship ... [m]ostly from 1978 on, he always introduced me as his wife and we just presented ourselves as a [sic] married couple." *Staudenmayer,* 532 Pa. at 258, 714 A.2d at 1018 (quoting Notes of Testimony).

Common pleas concluded that wife failed to prove clearly and convincingly that the couple had exchanged *verba in praesenti,* or the present exchange of words spoken to establish a husband and wife relationship. The Supreme Court affirmed, noting in part that wife could not recall the "specific instance of when she and [husband] said to each other, `we are husband and wife.'" *Id.* at 265, 714 A.2d at 1022.

[10] *Id.* at 261 n.4, 714 A.2d at 1020 n.4.

joined in by Justice Castille, urged the abolition of the doctrine, stating, "as marriage is necessarily an affirmative act, and ancient impediments no longer pertain, I would advocate the abolishment of common law marriage in Pennsylvania so that official records, and not the courts, may determine if and when the parties were married." *Id.* at 268, 714 A.Zd at 1023 (Nigro concurring).[11]

In this case, unlike *Staudenmayer,* the parties have preserved and fully argued the issue, so it is squarely presented for our consideration. Many sound reasons exist to abandon a system that allows the determination of important rights to rest on evidence fraught with inconsistencies, ambiguities and vagaries. The circumstances creating a need for the doctrine are not present in today's society. A woman without dependent children is no longer thought to pose a danger of burdening the state with her support and maintenance simply because she is single, and the right of a single parent to obtain child support is no longer dependent upon his or her marital status.[12] Similarly, the marital status of parents no longer determines the inheritance rights of their children.[13] Access to both civil and religious authorities for a ceremonial marriage is readily available in even the most rural areas of the Commonwealth. The cost is minimal, and the process simple and relatively expedient. Under Pennsylvania's statutory scheme, the fee for the issuance of

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[11] Justice Zappala concurred in the result.

[12] *See* 23 Pa. C.S. § 4321(2) (providing that parents are liable for the support of their children); 23 Pa. C.S. § 5102(a) [providing that children born out of wedlock shall enjoy all the rights and privileges as if they had been born during wedlock except as is otherwise provided in Title 20 (relating to decedents, estates and fiduciaries)]; *Branch v. Jackson,* 629 A.2d 170 (Pa. Super. 1993).

[13] 20 Pa. C.S. § 2107.

a license is $3.00. 23 Pa. C.S. § 1105(a). Moreover, the license to marry authorizes the performance of a ceremony in any county in the Commonwealth. 23 Pa. C.S. § 1301(b). An application for a license is required, containing each applicant's: (1) name; (2) occupation; (3) place of birth; (4) place of residence; (5) statement that he/she is not afflicted with a transmissible disease; and (6) parents' name, residence, occupation and birthplace. 23 Pa. C.S. § 1302. In connection with the application, each applicant must appear for an examination under oath regarding such factors as the legality of the marriage and the existence of and dissolution of any prior marriages. 23 Pa. C.S. § 1306. Unless there is an emergency or extraordinary circumstances requiring court intervention, there is a three day waiting period for a marriage license following submission of the application. 23 Pa. C.S. § 1303. Once a license to marry is issued, the marriage can be solemnized by various persons, including judges, district justices, magistrates, mayors and clergy of any regularly established church or congregation. 23 Pa. C.S. § 1503. In the alternative, couples have the option of solemnizing their marriage themselves after obtaining certification that no legal impediment to marriage exits. 23 Pa. C.S. § 1502. Indeed, since couples may thus marry themselves, the only differences between this form of statutory marriage and that of common law are the requirement of witnesses and the licensing procedure.

In addition, imposing the rights and obligations attendant to marriage only upon those who have entered into their unions pursuant to these statutory procedures has many advantages. It provides a bright line standard to guide the courts in adjudicating disputes and the public in conducting and defining their relationships with some measure of certainty and stability. It furthers the beneficial provisions of the Marriage Law, and reduces both the need

for litigation to settle rights and the opportunity for fraudulent claims.

As the Superior Court of Pennsylvania astutely observed in 1941:

> [T]here is widespread confusion among laymen generally, and to some extent among laymen in administrative boards and positions, as to what a common law marriage is. Influenced, perhaps, by the newspaper custom of referring to a man's mistress or paramour as his "common law wife", there is a general tendency to regard every case of a man and woman living together, without a ceremony of marriage performed by a church or state official, as a common law marriage, irrespective of whether the relation is lawful or illicit.

Baker v. Mitchell, 17 A.2d *738, 741* (Pa. Super. *1941). Accord McCoy,* 256 A.2d at 910. The fact that in today's world many couples choose to cohabit without any intention of being presently married only adds to the potential difficulties generated by a common lack of public understanding as to what separates a common law marriage from mere cohabitation.[14] Some persons may mistakenly

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[14] In *Staudenmayer,* Justice Newman noted that when dealing with the rebuttable presumption of common law marriage based upon cohabitation and reputation:

> [W]e question the utility of constant cohabitation as an element of that presumption. Cohabitation between unmarried people today does not carry with it the same social taboo as when the common law marriage doctrine was developed, and is perhaps less indicative of an intent by a man and a woman to be husband and wife than it was fifty or one hundred years ago.

552 Pa. at 265 n.8, 714 A.2d at 1021 n.8.

mistakenly believe they are common law spouses if they have lived with another for an extended period of time, particularly if they have children together. Others may assume that they can never be deemed married unless they have gone through the statutory formalities. When their understanding is challenged by some dispute with their partners, third parties or government authorities, they may discover too late that they have foregone rights or undertaken responsibilities contrary to their intentions.

Even if those persons are assumed to know the law-and thus understand their own marital status-absent the record created by the formalization of a statutory marriage, innocent parties may easily be misled about their rights. For instance, it may be impossible for a man or woman entering into a marriage to discover that the prospective spouse has an undissolved common law marriage. Moreover, uncertainty as to marital status has a far greater detrimental impact on third parties today than when the doctrine was created. At that time, persons contemplating business transactions with couples relied predominantly, if not exclusively, upon the creditworthiness and earning capacity of the husband. Business relationships were rarely entered into with married women in their sole names. In twenty-first century commerce, third parties need and are entitled to know whether the men, women and couples with whom they contract are married or single, for that may significantly affect their rights. Statutory marriage provides a certain record if third parties chose to investigate; common law marriage may be impossible to ascertain or verify until some dispute brings about court proceedings.

Aside from the record it provides, demanding compliance with the requirements of the Marriage Law promotes its salutary purposes, notably screening of persons

who are unable to marry because of some legal impediment, transmissible disease, mental incompetency or drug or alcohol impairment. This screening furthers important policies related to public health and welfare and is entirely absent when a couple embarks upon a marriage at common law.

Finally, the conclusion seems inescapable that recognizing as married only those who have duly recorded their union pursuant to the Marriage Law will greatly reduce the need for litigation to determine marital status. Even where litigation is necessary, it will obviate the need for intensive fact inquiries into the details of parties' relationships and greatly decrease the opportunity to present the sort of fraudulent and perjurious claims our Supreme Court, and others, have repeatedly lamented. In hearing cases such as this, we have been struck by the tendency of litigants in these matters to view common law marriage as something rather like a legal raincoat they can put on and take off as changing circumstances dictate. We see records in which couples have told one side of the family that they were married and the other side that they were not, depending upon what each collection of relatives might approve. Other couples may swear in applying for benefits that they are man and wife, but file tax returns averring under penalty of perjury that they are single. One attorney in oral argument, when asked how he could explain affidavits to the IRS inconsistent with the testimony of his client in the litigation then before the court, replied matter-of-factly that he assumed it lowered their tax liability. What is truly astonishing is not that parties take inconsistent positions to gain advantage, but that they seem to see nothing particularly inappropriate in their chameleon-like behavior. We must conclude that this court can no longer place its imprimatur on

a rule which seems to be a breeding ground for such conduct and its attendant disrespect for the law itself.

As our Supreme Court noted in *Albert M. Greenfield & Co., Inc. v. Kolea,* 475 Pa. 351, 380 A.2d 758 (1977):

> "Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life particularly old common law doctrines which the courts themselves created and developed. As we have said before, '(T)he continued vitality of the common law ... depends upon its ability to reflect contemporary values and ethics."' (Footnote omitted).

Id. at 357, 380 A.2d at 760, quoting *Javins v. First Nat'l Realty* Corp., 428 F.2d 1071, 1074 (U.S.App.D.C. 1970). This does not dispose of the matter, however, for two questions remain. The first is whether or not we, as an intermediate appellate court have the authority to decline to follow a common law rule which our Supreme Court has heretofore left in place. We have found no direct authority on the matter from the Pennsylvania Supreme Court, but the matter has been repeatedly considered by the federal courts. Ordinarily such a step would be considered improper. *See, e.g., de Quijas v. ShearsonlAmerican Express, Inc.,* 490 U.S. 477, 484 (1989). However, many authorities have suggested that in an appropriate case "anticipatory overruling" may be not only permissible, but an obligation. *See* Margaret N. Kniffen, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals,* 51 Fordham L. Rev. 53, 74-75 (1982); *United States v. Girouard,* 149 F.2d. 760, 765 (ist Cir. 1945) (Woodbury, J., dissenting), *rev'd,* 328 U.S. 61 (1946); *Spector Motor Serv., Inc. v. Walsh,* 139 F.2d 809, 823 (2d. Cir.) (Hand, J., dissenting), *vacated sub nom., Spector Motor Serv. v.*

McLaughlin, 323 U.S. 101 (1944). We believe that the best view is that such action should be taken only in the extraordinary circumstance in which there can be no serious question as to our Supreme Court's intention. In other words, "the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." *Salerno v. American League of Prof. Baseball Clubs,* 429 F.2d 1003, 1005 (2d. Cir. 1970), *declined to follow on other grounds, Piazza v. Major League Baseball,* 831 F. Supp. 420 (E.D. Pa. 1993). We believe this is just such a case. In *Staudenmayer* our Supreme Court, while declining to reach the issue, "has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons." *Republic Steel v. Maddox,* 379 U.S. 650, 667 (1965) (Black, J., dissenting). Accordingly henceforth, this court will recognize as valid only those Pennsylvania[15] marriages entered into pursuant to the Marriage Law procedures.

Finally, we must determine the scope of application of our ruling. As our Supreme Court has explained:

> This Court has recognized four approaches to applying a decision announcing a new rule of law. *Blackwell v. Commonwealth, State Ethics Comm'n,* 527 Pa. 172, 589 A.2d 1094 (1991). Mr. Justice Zappala cogently explained these four approaches in his Concurring Opinion in *Blackwell* as follows:
>
> The first approach, in which a new rule is not even applied to the parties to the case in which the

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[15] We express no opinion concerning marriages entered into in other states and recognized in those jurisdictions as valid.

> rule is announced, may be described as giving the new rule "purely prospective effect". The second approach, in which the new rule is applied to the parties to the case in which the rule is announced and litigation commenced thereafter, is best described, I believe, as giving the new rule "prospective effect" . . . . The third approach, in which the new rule is applied to the case in which it is announced and all other cases then pending on direct review where the issue is raised, may be said to give the new rule "retroactive effect". . . . The fourth approach, in which the new rule is applied even where the issue has been finally decided at the time of the decision announcing the new rule but later is asserted in collateral proceedings, may be described as giving the new rule "fully retroactive effect".

Id. at 190-91, 589 A.2d at 1103.

Cleveland v. Johns-Manville Corp., 547 Pa. 402, 409 n. 8, 690 A.2d 1146, 1150 n.8 (1997), *declined to follow on other grounds, Norfolk & Western Railway Co. v. Ayers,* 123 S. Ct. 1210 (2003). Neither the United States Constitution, nor the Pennsylvania Constitution, mandates or precludes a retroactive application of a new decision. *Id.* at 412, 690 A.2d at 1151. Although the general rule prefers retroactive (but not fully retroactive) application, it is a matter of judicial discretion to be exercised on a case by case basis. *Id.* at 413, 690 A.2d at 1151-52. When a decision announces a new principle of law:

> [C]onsider the following three factors to decide if the new rule should be applied retroactively or prospectively: (1) the purpose to be served by the new

rule; (2) the extent of the reliance on the old rule; and (3) the effect on the administration of justice by the retroactive application of the new rule.

Id. at 414, 690 A.2d at 1152. *Kituskie v. Corbman*, 552 Pa. 275, 283 n.5, 714 A.2d 1027, 1030 n.5 (1998).

On balance, we believe these factors favor purely prospective application in this case. The benefits of the new rule will generally only be felt in the future no matter how it is applied. Persons can arrange their affairs only for the present and future; retroactive application will not cure mistakes made in the past based on misunderstanding of the old law. A clear rule will assist the courts only in deciding future cases; upsetting cases properly decided under the old law will aid neither the courts nor the litigants. Similarly, furthering the health and welfare policies of the Marriage Law and reducing the need for litigation can occur only in the future. In addition, the old rule was of such longstanding application that many have undoubtedly relied upon it, including the parties whose rights are now before the court. Finally, prospective application will give our Supreme Court an opportunity to review our holding, and minimize any disruption that might result should we have somehow misunderstood that body's intention.

Thus, we must turn to employer's alternative argument that Kretz failed to meet his burden of proof under the old law. Specifically, PNC argues that the WCJ erred in concluding that the common law spouse affidavit was sufficient to demonstrate the necessary *verba in praesenti*, the exchange of words in the present tense, spoken with the intent of creating the legal relationship of husband and wife. Employer contends that the affidavit is insufficient because it speaks to a past event rather than a present intent to marry.

Employer also contends that the affidavit cannot be construed as a reaffirmation of their intent to marry. We disagree and conclude that the affidavit and Kretz's testimony were sufficient to meet Kretz's burden of proof.

First, testimony regarding the mutual expressed intent to marry is always going to refer to a past event. Therefore, that the affidavit is written in the past tense does not undermine the finding that the couple had entered into a common law marriage. Indeed, if Kretz's testimony had exactly mirrored the affidavit, there would be no doubt that it would have been sufficient to meet his burden of proof regarding the requisite *verba in praesenti.* Second, Kretz's testimony regarding the manner in which the couple arrived at their date of marriage when signing the affidavit does not render the affidavit insufficient. The weight and credibility of Kretz's testimony were for the WCJ, and we cannot review his findings in that regard on appeal. We also conclude that the WO did not err in construing Kretz's testimony regarding the circumstances surrounding execution of the affidavit as well as the actual execution of the document itself as an independent exchange of words expressing the present intent to be husband and wife. Accordingly, we reject this assertion of error.[16]

Employer next asserts that the WCJ erred in relying on evidence of cohabitation and reputation in addition to the evidence of *verba in praesenti* to support her conclusion

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[16] We agree with employer that the Board erred in stating that a common law marriage must be demonstrated by substantial, competent evidence. *See Staudenmayer,* 552 Pa. at 264, 714 A.2d at 1021 (holding that where parties are available to testify to *verba in praesenti,* party claiming a common law marriage must produce clear and convincing evidence of the requisite exchange of words). However, since the WO applied the correct burden of proof, the Board's error does not command a reversal.

conclusion. According to employer, the WCJ erred in considering any evidence of reputation and cohabitation since Kretz was available to testify to the *verba in praesenti*. Employer also argues that the evidence was insufficient to demonstrate a broad and general reputation of marriage.

Employer is correct that permitting a party to demonstrate a common law marriage through evidence of reputation and cohabitation is a rule of necessity that only applies when direct evidence regarding the exchange of *verba in praesenti* is unavailable or there is conflicting evidence of *verba in praesenti*. *Staudenmayer*, 552 A.2d at 263-65, 714 A.2d at 1021. Regarding the admission of evidence of cohabitation and reputation when parties are available to testify to the requisite exchange of words, the Supreme Court stated in *Staudenmayer:*

> By requiring proof of *verba in praesenti* where both parties are able to testify, we do not discount the relevance of evidence of constant cohabitation and reputation of marriage. When faced with contradictory testimony regarding *verba in praesenti*, the party claiming a common law marriage may introduce evidence of constant cohabitation and reputation of marriage in support of his or her claim. We merely hold that if a putative spouse who is able to testify and fails to prove, by clear and convincing evidence, the establishment of the marriage contract through the exchange of *verba in praesenti*, then that party has not met its "heavy" burden to prove a common law marriage, since he or she does not enjoy any presumption based on evidence of constant cohabitation and reputation of marriage.

Id. at 264-65, 714 A.2d at 1021 (footnote omitted). Thus, while evidence of cohabitation and reputation was irrelevant to a determination of whether Kretz met his burden of proof, the admission of such evidence does not amount to reversible error because the WCJ found a common law marriage based upon the exchange of *verba in praesenti.* Furthermore, since Kretz testified to the exchange of *verba in praesenti,* his case rose and fell on the sufficiency of that testimony. Therefore, the sufficiency of the evidence of cohabitation and reputation is completely irrelevant and we will not review it to determine whether it supports a finding of common law marriage.

Employer also argues that the WCJ erred in failing to draw an adverse inference based upon Kretz's failure to present the testimony of Stamos' children regarding the marital status of their mother. In *Commonwealth v. Moore,* 453 Pa. 302, 309 A.2d 569 (1973), the Supreme Court articulated the missing witness rule as follows:

> Generally, when a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not be merely cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference it would have been unfavorable. *See* McCormick, Law of Evidence, 534 (1954). *See also Bentivoglio v. Ralston,* 447 Pa. 24, 288 A.2d 745 (1972), and *Commonwealth v. Wright,* 444 Pa. 536, 282 A.2d 323 (1971).

Id. at 305, 309 A.2d at 570. It must be emphasized that the adverse inference is allowed only when the uncalled witness

is peculiarly within the reach and knowledge of only one party. *Bennett v. Sakel,* 555 Pa. 560, 563-64, 725 A.2d 1195, 1196 (1999).

Here, employer contends that Stamos' children "would have been within the control of [Kretz] as members of his extended family, a situation giving [Kretz] access and influence with respect to their testimony, clearly within the ambit of the rule." Petitioner's appellate brief at 38. Employer does not contend, however, that it lacked knowledge of Stamos' children prior to the litigation or could not call them itself. Furthermore, there is no evidence that Stamos' children were peculiarly within the reach of Kretz only. Accordingly, we conclude no error occurred.[17]

Finally, employer argues that the WCJ committed reversible error by failing to make any factual findings regarding the testimony of John Heinlein, III, a witness offered by Kretz. According to employer, this failure is critical because Heinlein testified that Kretz and Stamos were not married ceremonially or at common law. Employer contends that the WCJ's failure to make such findings indicates she may have overlooked the testimony or misunderstood the "application of said testimony to the law." Employer also contends that the WCJ's failure resulted in an unreasonable decision in violation of Section 422(a) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended,* 77 P.S. § 834.[18] We disagree.

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[17] According to Kretz, both children were over the age of eighteen during the litigation.

[18] Section 422(a) provides that parties are entitled to a reasoned decision, which contains findings of fact and conclusions of law based upon the evidence and explains the rationale for the so that one can understand how and why the particular result was reached. Section

(Footnote continued on next page...)

Notwithstanding the fact that we disagree with employer's characterization of Heinlein's testimony, it is clear that the WCJ considered the testimony as she stated that, "After careful review of the testimony that has been offered in this matter by Mr. Kretz, *as well as the other witnesses,*[19] and a review of the various documents that have been offered, I find that the claimant, John Kretz, has established that a common law marriage did exist . . . ." WCJ's opinion at 7 (emphasis and footnote added). This court has held that Section 422(a) of the Act does not require the WCJ to address all of the evidence before him/her. *Montgomery Tank Lines v. Workers' Comp. Appeal Bd. (Humphries),* 792 A.2d 6, 13 n.10 (Pa. Cmwlth. 2002). Rather, "the WCJ is only required to generally set forth the reasons for making the finding and is only required to make those findings necessary to resolve the issues that were raised by the evidence and which are relevant to making the decision." *Id.* Here, the WCJ set forth the evidence critical to her findings and such findings were all that was necessary to resolve the issue of whether a common law marriage had been proved. Accordingly, this contention is meritless.

Based upon the foregoing, the order of the Board is affirmed.

(comtinued...)

422(a) also provides that when faced with conflicting evidence, the WO must adequately explain the reasons for accepting or rejecting competent evidence.

[19] There were only 3 witnesses in the case and the WO made specific findings regarding two of the witnesses - Kretz and Gillespie. If the WO had not reviewed Heinlein's testimony, she would not have used the plural form of the word witness in the phrase "as well as the other witnesses."

BONNIE BRIGANCE LEADBETTER,

Judge Simpson concurs in the result only.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PNC Bank Corporation,	:	
Petitioner	:	
	:	
v.	:	No. 860 C.D. 2002
	:	
Workers' Compensation Appeal Board	:	
(Stamos),	:	
Respondent	:	

ORDER

AND NOW, this 17th day of September, 2003, the order of the Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

_____

BONNIE BRIGANCE LEADBETTER

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PNC Bank Corporation, Petitioner	:	
v.	:	:No. 860 C.D. 2002
	:	:Argued: October 9, 2002
Workers' Compensation Appeal Board (Stamos), Respondent	:	

BEFORE:
HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENEE L. COHN, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

DISSENTING AND CONCURRING OPINION BY JUDGE SMITH-RIBNER **FILED:** September 17, 2003

I respectfully dissent from the majority opinion because of my strong disagreement with a determination by an intermediate court of this Commonwealth that the right granted at common law to individuals to enter into common law marriage henceforth shall no longer exist. The majority usurps the function of the legislature and casts upon the

people of this Commonwealth a change in common law that the majority has no authority or power to impose. When the people desire to abolish common law marriages, they should do so through their elected representatives in the legislature. The Supreme Court thought so in a situation involving the court's power to change the common law duty of a parent for the support of a minor child. The court felt that a "more prudent course" of action was to await guidance from the legislature rather than to create duties or obligations by judicial fiat. *Blue v. Blue,* 532 Pa. 521, 616 A.2d 628 (1992).

The majority reads dicta from *Staudenmayer v. Staudenmayer,* 552 Pa. 253, 714 A.2d 1016 (1998), as evidence that the Supreme Court would act to abolish common law marriages if only it had the right case before it and since the issue is now squarely before this Court that it should act instead. That logic is faulty for various reasons, the least of which is that only two members of the seven-member Supreme Court voted for the court to seize the opportunity in *Staudenmayer* to abolish common law marriages. A clear majority of the Supreme Court did not do so and perhaps for the very sound reason that it chose not to act in *Blue* to change duties or obligations established at common law or more recently in *Benson v. Patterson,* ___ Pa. ___ , ___ A.2d ___ (No. 5 MAP 2002, filed August 26, 2003) (Newman, J. dissenting). The issue in *Benson* was whether the Supreme Court could extend a duty of support for two minor children upon the estate of the deceased father and to require the estate to pay outstanding support orders, as well as increases, to the respective mothers until the minor children reached the age of majority.

In rejecting the notion that it could extend a duty of child support beyond the father's death, the Supreme Court very clearly expressed its position:

Under the Common Law, a parent had a duty to support a minor child. In its wisdom, our General Assembly has bestowed adulthood on minor children at age 18. Consequently, the common law duty to support a minor child must by necessity cease at age 18.... Accordingly, since no legal duty has been imposed by our legislature, nor have we developed such a duty by our case law, we decline to do so. Since our legislature has taken an active role in domestic matters through amendments and reenactment of the Divorce Code and the Domestic Relations Act, we feel the more prudent course is to await guidance from that body rather than creating duties and obligations by judicial pronouncement.
[*Blue,* 532 Pa. at 529, 616 A.2d at 632].

We apply the same reasoning to the case at bar. A child's needs do not end when a parent dies, but as sympathetic a fact as this may be, there are other considerations in the law, and it is clear we must defer to the legislature, which has taken an active role in developing the domestic relations law of Pennsylvania. *Garney* [*v. Estate of Hain,* 653 A.2d 21 (Pa. Super. 1995)] was decided in 1995. The General Assembly could have responded to the holding in *Garney,* (as it did in *Blue),* by amending the domestic relations and estate statutes; it has not done so, and it is not the role of the judiciary to legislate changes the legislature has declined to adopt.

Benson, ___ Pa. at ___, ___ A.2d at ___, slip op. at 3-4 (emphasis added).

The majority chronicles decisions from other jurisdictions, where common law marriage has been abolished, and it relies in part on a decision from the New Jersey Supreme Court in *Dacunzo v. Edgye,* 117 A.2d 508 (N.J. 1955). The majority misses the point, however, of *Dacunzo:* the people of New Jersey abolished common law marriages through legislative action, not by judicial fiat from that state's Supreme Court or by intermediate court pronouncement. In *Staudenmayer* the Supreme Court expressly noted that it did not abolish common law marriages in Pennsylvania, and in *Brandywine Paperboard Mills v. Workers' Compensation Appeal Board (Zittle),* 751 A.2d 1205 (Pa. Cmwlth. 2000), this Court cited *Staudenmayer* in recognition of the fact that common law marriage still exists in Pennsylvania.

In the matter of *Interest of Miller,* 448 A.2d 25 (Pa. Super. 1982), the appellant requested the Superior Court to abolish common law marriage in Pennsylvania or to align the age of consent to that required for statutory marriage. The court declined the opportunity, as it had done before, to abolish common law marriage or to modify the doctrine, stating the following:

Past efforts in the Legislature to abolish common law marriage have failed. Freedman, 1 Law of Marriage and Divorce in Pennsylvania, §50a (2d ed. 1957). The Marriage Law, Act of August 22, 1953, P.L. 1344, 48 P.S. §1-23 [repealed by Section 6 of the Act of December 19, 1990, P.L. 1240, *see now* 23 Pa. C.S. §1103] explicitly preserves the right to contract a common law marriage, providing that `[n]othing herein shall be construed to change the existing law with regard to common law marriage.' This remains the legislative intent, as may be seen from the fact that the Divorce Code of 1980 did not repeal this provision of The

Marriage Law, although it did expressly repeal another provision. *See* Perlberger, Pennslyvania Divorce Code § 2.5 (1980). For us to ignore so clear an expression of legislative intent would be an abuse of judicial power. If common law marriage is to be abolished, or the requirements for entering into it changed, it must be done by the Legislature, not the courts.

Id. At 32 (footnote omitted) (emphasis added).

That the majority of this Court has taken a position which is in complete and total contradiction of case law is pretty obvious. The Supreme Court declined an opportunity to change the common law as it relates to child support duties or obligations as requested in *Blue,* and in *Benson* the court declined the opportunity to change common law regarding the imposition of support obligations upon a decedent's estate because it was up to the legislature to do so rather than the court. The Superior Court in *Miller* declined a request to abolish common law marriage because that matter too was up to the legislature to determine rather than the court. There is no question that this Court should likewise decline PNC's request for it to abolish common law marriage, which has long been recognized in this Commonwealth.

If the Pennsylvania legislature determines in its wisdom, as have the legislatures in New Jersey or in Florida, *see* N.J.S. §37:1-10, Fla. S. §741.211, and many other jurisdictions, to take up the issue of abolishing common law marriage then at that time it may well consider and debate many of the policy considerations expressed by the majority here for doing what it has no authority or power to do. Otherwise, I concur with the majority's decision to affirm the grant of the fatal claim petition of John Kretz because he

proved a common law marriage with the decedent Janet Stamos.

DORIS A. SMITH-RIBNER, Judge

Judge Pellegrini joins in this dissenting and concurring opinion.

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THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

August 29, 2002

Mr. Nicolai Von Kreisler
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Mr. William D Powers
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RE: Case Number 02-0520
Court of Appeals Number: 03-01-00288-CV
Trial Court Number: 96-14089

Style: APPARAJAN GANESAN
v.
SUDHA VALLABHANENI

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above-referenced case. (Justice O'Neill not sitting.)

Sincerely,
Andrew Weber, Clerk

By signed// Jessica L. Vlassac
Jessica L. Vlasac, Deputy

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza

3D

SUPREME COURT OF THE STATE OF TEXAS

Case Number: 02-0520

Date Filed: 6/14/2002

Case Type: PET FOR FREV/MET

Style: APPARAJAN GANESAN

V: SUDHA VALLABHANENI

Case Number: 02-0520 -> Event: 1265

Date: 8/29/2002

Event Type: Petition for Review under Rule 53 Disposed of

Disposition: Pet/app denied with Justice not sitting

(This information was obtained from Texas Judiciary Online, www.supreme.courts.state.ts.us/opinions)

FILED
IN SUPREME COURT
OF TEXAS
JUL 22 2002
ANDREW WEBER, Clerk
By:_____ Deputy

02-0520

CAUSE NO. 02-520
IN THE SUPREME COURT OF TEXAS
APPARAJAN GANESAN, *Petitioner*
VS.
SUDHA VALLABHANENI, *Respondent*

PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner APPARAJAN GANESAN submits this *Petition For Review* and requests the Court to consider the following issues.

1. *As a matter of law, Respondent was never married to Petitioner at common law under circumstances where, as a foreign national and resident alien, she declared unequivocally during the alleged marriage that she was an "unmarried single" to the Immigration Service, the Internal Revenue Service and the passport branch of the Indian Consulate.*

Respondent filed for divorce around September 1996 claiming a common law marriage to Petitioner as of September 24, 1994. The jury found that the common law marriage existed as of February 23, 1995.

However, in May 1995, Respondent filed several documents with the immigration service stating that she was unmarried and single (see testimony of INS Agent). Respondent's divorce case, like her claim to have been married before that time, makes her a violator of 18 USCA § 1546, 18 USCA § 1015, 8 USCA § 1227(a)(3)(B)iii and 8 USCA § 1227(a)(3)(C)i.

Petitioner notes that the five-prong test established in *US vs. Maria Del Carmen Cortilla Montemyor,* 712 F.2d 104, of statement, falsity, materiality, specific intent and agency jurisdiction, can easily be established in the present case. Similar falsities have been prosecuted. *See, e.g., USA v. Yum,* 776 F.2d 490 and USA v. *Wiggan,* 673 F.2d 145.

In a related 2001 bankruptcy examination, the Internal Revenue Service has identified the marital status of Respondent as "single" but has refused to launch criminal inquiry (which would result in deportation) for lack of adequate recoverable assets. The State Department declared its unwillingness to compel the Indian Consulate to release Respondent's passport information citing the sensitive nature of the State Department's negotiations with India. Earlier the Consulate refused to obey a Travis County District Court order citing "sovereignty," with the result that Petitioner was unable to present this evidence at trial, notwithstanding his request for a postponement.

Respondent and her attorneys contend that her statement of being unmarried on immigration, passport, visa, and tax documents goes merely toward the cumulation of evidence on the issue of common law marriage or not. *Matter of the Estate of Giesel,* 734 SW2d

27, 31 (Tex. Civ. App.-Houston [1st Dist.] 1987, writ refused, n.r.e.). Petitioner argues that statements by an alien resident in immigration and passport documents are irrevocable and binding and, as a matter of law, cannot be negated merely because other evidence may preponderate otherwise.

2. *Petitioner's bankruptcy proceeding automatically stayed the limitations period for his request for the court reporter's notes and records such that it was error for his case not to be remanded to the trial court for a new trial.*

Petitioner complained on appeal that he should be granted a new trial because the record was incomplete. The court reporter had destroyed her notes and records before he had a chance to request or obtain them for purposes of his appeal.

Petitioner should have been granted a new trial for the following reasons. Actions taken by Respondent in the divorce proceedings prevented Petitioner from meeting his financial obligations to Mead Corporation, a creditor, and required him to file a Chapter 7 bankruptcy in December 1997, Case No. 98-10295-FM-7, In the US Bankruptcy Court, Western District, Austin Division. Petitioner's total obligation to Mead by that time exceeded $7,513,000.00. The legislative history of 11 USC § 541 states, "it includes all kinds of property including tangible or intangible property, causes of action ... all other forms of property currently specified in section 10a of the Bankruptcy Act. " *In re: O'Dowd,* 233 F.3d 197, 202 (3rd Cir. 2000). It is also stated in *Integrated Solutions v. Service Support,* 124 F.3d 487, 491 (3rd Cir. 1997):

> while we have not decided the issue, we have previously noted the broad sweep of § 541 and the

> fact that section expressly includes 'causes of action' as property included in the estate .... Given § 541's broad scope, its legislative history, and the weight of authority from other jurisdiction we conclude that state laws prohibiting the assignment or transfer of property, including causes of action and tort claims, do not prevent the inclusion of such property in the bankruptcy estate.

It is an incontrovertible fact that Petitioner listed his claims against Respondent as property of the bankruptcy estate and repeatedly asked the Bankruptcy Trustee to act on them. Under these circumstances, the broad sweep of § 541 overrides any precedent arising from state case law such as *Pitrowski v. Minns,* 873 SW2d. 368 (Tex. 1993). Moreover, in *Official Committee v. R.F. Lafferty & Co.,* 267 F.3d 340, 346 (3rd Cir. 2001), the court said, "under section 541, the bankruptcy estate includes all legal or equitable interests of the Debtor in property as of the commencement of bankruptcy." This case directs courts to evaluate defenses as they existed at the commencement of bankruptcy.

Petitioner believes it is clear from the above that his bankruptcy proceeding stayed the limitation period for his request for the court reporter's notes and records. The advent of the Chapter 7 estate and the appointment of the Chapter 7 Trustee divested Petitioner, as a Chapter 7 debtor, of all right, title and interest in non-exempt property of the estate as of the commencement of the bankruptcy case. *Spenlinhauer v. 0'Donnel, 261* F.3d 113, 118 (1st Cir. 2001). Federal case law overwhelmingly supports the argument that the Bankruptcy Trustee retained the right to Petitioner's interest in the court reporter's notes. Because Petitioner had no interest in the court reporter's notes and records, and because his interest in them was clearly the property of the bankruptcy estate, the

requirements of *Petrowski v. Minns* do not apply, and Petitioner is entitled to a new trial because his appellate record was incomplete.

3. *It was error for the trial court to fail to submit Petitioner's requested instructions to jury.*

The appellate court stated that trial courts are charged with submitting "such instructions and definitions as shall be proper to enable the jury to render a verdict and the trial court's latitude in this area is even greater than in the area of jury questions."

A reflection on the jury's questions delivered to the trial judge during deliberations points to the problem in the appellate court's not finding error in the trial court's failure to submit Petitioner's requested instructions. The jury was clearly confused as to whether it had to find that Petitioner was married in Texas or in India or worldwide. Obviously Petitioner's testimony regarding why he didn't stay with his future mother-in-law when he visited India was behind this confusion. Petitioner's instructions would have clarified the issues in this case and they were absolutely necessary given the conflicting testimony of both parties on the issues.

Petitioner contends that the court's charge caused the rendition of an improper verdict. Given the circumstances, the nature of the parties' agreement--to get married in the future, not to be married at the present--was of the utmost importance and went to the heart of the dispute. It was clear from the questions the jury sent during deliberations that it was having great difficulty in evaluating the evidence and answering the question before it. One cannot declare both to be single and married. Yet, given the testimony of each party, which showed them both as representing themselves

as single and married at various times but never at the same time, it caused reversible harm to have excluded the instruction from *Fuentes v. Transamerican National Gas,* 933 SW2d 624 (Tex. App. San Antonio 1996, *reversed in part on other grounds,* 962 S.W.2d 28 [Tex. 1997]), that one cannot both declare to be single and married or drop in and out of a marriage based on financial opportunities. *Leal v. Moreno,* 733 SW2d 322 (Tex. Civ. App.-Corpus Christi 1987, no writ), and *Thomkins v. State,* 774 SW2d 195 (Tex. Crim. App. 1987), clearly established that a future agreement to marry does not establish marriage. This went to the heart of the case. Russell v. *Russell,* 865 SW2d 929 (Tex. 1990), clarified the lack of weight that casual, off-the-cuff uncontradicted references to "my husband" or "my wife" have toward an alleged agreement to be married. This was a core issue and a highly divisive one at trial. It is impossible for a rational trier of fact to come to a proper judgment in this case without the clarifying aids of Petitioner's requested instructions derived from these prior case rulings.

4. *It was error for the court to have failed to admit into evidence the letter from Respondent's mother suggesting a May/June 1995 wedding date.*

Respondent's mother's letter was an important piece of evidence. Had it been admitted it would have negated the testimony of Respondent's siblings because it showed that Respondent's family did not believe or consider the parties to be married at that time. Respondent contended that, having been brought up as a traditional Indian woman, she would never have moved in with Petitioner without marriage (note that the jury, in its verdict, chose the move-in date as the common law marriage date). Yet the mother of this traditional Indian woman broached the subject of a marriage

at a future date some five months later, which clearly suggests that the parties had an agreement to marry in the future and underscores their current unmarried state. The letter supported clearly Petitioner's position, and had it been admitted the jury would in all probability not have found the "move-in" date as the common law marriage date. The appellate court questioned how the state of mind of Respondent's family was relevant to prove the parties mutual agreement to be married. Since the verdict was to be determined by a preponderance of the evidence, had Respondent's mother's contemporaneous letter been admitted, there would have been virtually no credible evidence to support the existence of a marital contract. The trial court erred in not admitting it because authentication was clearly met under the circumstances. Tex. R.E. 901(4).

5. *The evidence was legally and factually insufficient to support the existence of a common law marriage.*

The first issue presented above clearly questions whether a resident alien, who filed multiple federal documents (some sworn to) as a single person, could turn around and file for a divorce from a common law marriage. Unlike a US citizen, a resident alien owes her Texas residency to declarations she made under federal law, which supersedes any Texas common law marriage statutes. Moreover, even a cursory examination of the trial record suggests that if the testimony of Respondent's siblings had -been balanced against her mother's letter concerning a future wedding date, the evidence left over would not make a case for common law marriage. If anything, the conclusion a rational trier of fact would have to reach is that two people on various occasions made a lot of contradictory statements regarding their marital plans and status. This is not legal or factually sufficient evidence to support the

existence of a common law marriage under the authorities underlying Petitioner's requested jury instructions.

6. Petitioner's property was unlawfully taken away from him as a result of the divorce case.

Petitioner was a successful computer engineer and inventor. He was a wealthy individual, by his standards, before he ever met Respondent. His bankruptcy estate was over $1 million. The evidence showed that he earned his wealth before the time of the alleged marriage. Petitioner urges that the only reason a common law marriage claim was filed against him was to take his wealth, which it has.

It is incontrovertible that an action of fraud was committed by a resident alien against him, which the INS agent who was a witness at the trial confirmed through his testimony and even went so far as to warn of dire consequences if an alien persisted with a false claim that was inconsistent with her sworn documents. Had the INS, IRS and the State Department, whose help Petitioner actively sought, acted in a timely manner, Petitioner's property would have been protected. Lack of due process, in violation of the 5th Amendment and the 14th Amendment of the US Constitution, led Petitioner to a bankruptcy and the total destruction of his wealth in this case.

Petitioner notes that "due process is flexible and calls for such procedural protections as a particular situation demands." T E. Corp. 836 F2d 217. Due process involves basic notions of justice and fair play. *Haug v. Franklin,* 690 SW2d 646; 225 SW3d 85. In assessing fundamental fairness for due process, one must infer from the totality of facts of a particular case in light of reason, precedent, history, private interest at stake, government's interest and risk of erroneous

decisions from procedures employed. 914 SW2d 256. Petitioner submits as an issue to preserve his rights at law that the continued affirmation of a common law marriage gives rise to federal actions for fraud, for extraordinary relief, and for remedies under the immigration laws.

Respectfully submitted,

APPARAJAN GANESAN
TDC 904088
Roach Unit
Route 2, Box 500
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Signed//: A. Ganesan by N. von Kreisler with permission
Apparajan Ganesan
PRO SE

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By: signed//: N v Kreisler
Nicolai von Kreisler
SBN 20616500

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on this 22 day of July, 2002.

William D. Powers
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FILED
IN SUPREME COURT
OF TEXAS
JUL 23 2002
ANDREW WEBER, Clerk
By:_____ Deputy

02-0520

CAUSE NO. 02-0520

APPARAJAN GANESAN,	§	**IN THE**
Petitioner	§	
	§	
vs.	§	**SUPREME COURT**
	§	
SUDHA VALLABHANENI	§	
Respondent	§	**OF TEXAS**

APPENDIX TO PETITION FOR REVIEW

Petitioner APPARAJAN GANESAN submits the following appendix to Petitioner's petition for review.

1. Interlocutory Judgment in Cause no. 96-14089: *In* the Matter *of* Marriage *of Sudha Vallabhanenei and Apparajan Ganesan;* in the 353th Judicial District, District Court, Travis County, Texas.

2. Final Decree of Divorce in Cause no. 96-14089: *In* the Matter of Marriage *of Sudha Vallabhanenei and Apparajan Ganesan;* in the 353th Judicial District, District Court, Travis County, Texas.

3. Judgment and Opinion in Cause No. 03-01-00288-CV: *Apparajan Ganesan v. Sudha Vallabhaneni;* Texas Court of Appeals, Third District, At Austin.

Respectfully submitted,
APPARAJAN GANESAN
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Signed//: A. Ganesan by
N. von Kreiseler with permission
Apparajan Ganesan
PRO SE

[This NOTE is not part of "APPENDIX TO PETITION FOR REVIEW":
Items 1-3 of the Appendix to Petition for Review are reprinted in Appendix D of the Writ of Certiorari and therefore are not reprinted in this Appendix.]

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on this 23 day of July, 2002.

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Signed//: N v Kreisler
Nicolai von Kreisler

MANDATE

THE STATE OF TEXAS

TO THE 353RD DISTRICT COURT OF TRAVIS COUNTY, GREETINGS:

Trial Court Cause No. 96-14089

Before our Court of Appeals for the Third District of Texas on March 21, 2002, the cause on appeal to revise or reverse your judgment between

Apparajan Ganesan

No. 03-01-00288-CV v.

Sudha Vallabhaneni

Was determined, and therein our Court of Appeals made its order in these words

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's judgment: **IT IS THEREFORE** considered, adjudged and ordered that the judgment of the trial court is in all things affirmed. It is **FURTHER** ordered that the appellant pay all costs relating to this appeal, both in this Court and the court below; and that this decision be certified below for observance.

Wherefore, we command you to observe the order of our Court of Appeals in this behalf and in all things have the order duly recognized, obeyed, and executed.

Witness the Honorable Marilyn Aboussie, Chief Justice of the Court of Appeals for the Third District of Texas, with the seal of the Court affixed in the City of Austin on October 21 , 2002.

DIANE O'NEAL, CLERK

By: Stephen W. unreadable

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED MARCH 21, 2002

NO. 03-01-00288-CV

Apparajan Ganesan, Appellant
v.
Sudha Vallabhaneni, Appellee

APPEAL FROM 353RD DISTRICT COURT OF TRAVIS COUNTY BEFORE CHIEF JUSTICE ABOUSSIE, JUSTICES YEAKEL AND PURYEAR AFFRIMED –OPINION BY CHIEF JUSTICE ABOUSSIE

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's judgment: **IT IS THEREFORE** considered. adjudged and ordered that the judgment of the trial court is in all things affirmed. It is **FURTHER** ordered that the appellant pay all costs relating to this appeal, both in this Court and the court below; and that this decision be certified below for observance.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-01-00288-CV

Apparajan Ganesan, Appellant

v.

Sudha Vallabhaneni, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 353RD JUDICIAL DISTRICT NO. 96-14089, HONORABLE MARGARET A. COOPER, JUDGE PRESIDING

Appellant Apparajan Ganesan appeals the district court's interlocutory order that he and Sudha Vallabhaneni were married at common law, as well as the subsequent final decree of divorce dividing their marital estate. In three issues, appellant contends that: (1) he is entitled to a new trial because the record of the six-day jury trial resulting in the common law ruling is incomplete; (2) the district court erred in rendering a judgment of common law marriage; and (3) the district court erred in the characterization and division of the parties' property in the final divorce decree. We will affirm the judgment of the district court.

BACKGROUND

In 1994, Ganesan responded to Vallabhaneni's matrimonial advertisement in a magazine, and the two began a relationship. Soon after, the couple began contemplating a formal marriage. During the third week of February 1995,

Vallabhaneni moved from California to live with Ganesan in Austin. At times throughout the relationship, the parties publicly held themselves out to be married.

In August 1996, the couple separated, and Vallabhaneni sought a protective order against Ganesan. Ganesan violated the protective order, and while serving a fourteen-day sentence, he solicited another inmate to have Vallabhaneni murdered. In 1997, Ganesan filed for bankruptcy, and during negotiations he solicited a second individual to have Vallabhaneni and her attorney murdered. Ganesan was convicted of two counts of solicitation to commit murder, and this Court affirmed that conviction relating to acts against Vallabhaneni. *See Ganesan v. State*, 45 S.W.3d 197 (Tex. App.--Austin 2001, pet. ref'd).

The parties tried the common law marriage issue to a jury and thereafter tried the remaining issues before the court. In January 1998, the district court rendered interlocutory judgment on the jury's verdict that Vallabhaneni and Ganesan were married at common law on February 23, 1995. On February 21, 2001, the district court signed a final decree of divorce.

DISCUSSION

Incomplete Reporter's Record

In his first issue, appellant argues that because the record of the jury trial is incomplete, he is entitled to a new trial. *See* Tex. R. App. P. 34.6(f). The jury trial began September 8, 1997, and lasted six days. The court reporter destroyed the notes and tapes of the proceedings for September 9 and 10 after the expiration of three years. Ganesan did not request

that the reporter prepare the record until May 2001. The two missing days included appellee's testimony during the jury trial portion of the cause.

Court reporters are permitted to destroy records after three years. *See* Tex. Gov't Code Ann. § 52.046(a)(4) (West 1998); *see also Piotrowski v. Minns*, 873 S.W.2d 368, 370 (Tex. 1993) ("By negative implication, the statute authorizes reporters to cull stale notes from their records after three years from the date on which they were taken."). Ganesan argues he is entitled to a new trial because he "timely requested" the record and it was lost or destroyed "without appellant's fault." *See* Tex. R. App. P. 34.6(f).

The Texas Supreme Court has expressly held that "[i]f a litigant has not requested the reporter to prepare a statement of the facts within three years, nor specifically requested that the notes of a proceeding be preserved beyond three years, then the litigant is not free from fault . . . ." *See Piotrowski*, 873 S.W.2d at 371. Because Ganesan could have requested the reporter to prepare the record within three years of the proceeding, or at minimum requested that the record be preserved, he is not free from fault. Accordingly, he is not entitled to a new trial. *See id.* at 370 (holding appellant is not entitled to a new trial unless the reporter's notes have been lost or destroyed *without appellant's fault* and the parties cannot agree on a statement of facts).[1]

Appellant argues that his request for the reporter's record was timely because it was made "at or before the time for perfecting appeal." *See* Tex. R. App. P. 34.6(b)(1). Rule

[1] Appellant concedes that he is unable to provide authority for the proposition that his bankruptcy proceeding stayed the limitations period for his record request.

34.6(f) clearly requires a timely request and loss or destruction of the reporter's notes without appellant's fault before he is entitled to a new trial. *See* Tex. R. App. P. 34.6(f)(1)&(2). Because appellant is not free from fault, the fact that his request may have been timely under Rule 34.6(b)(1) is irrelevant. Accordingly, we overrule appellant's first issue.

Jury Charge

In his second issue, appellant argues that the district court erred by: (1) failing to properly instruct the jury on common law marriage, and (2) refusing to admit into evidence a letter from appellee's mother suggesting a possible future marriage date.

The standard of review for error in the jury charge is abuse of discretion. *Texas Dep't of Human Servs. v. E. B.*, 802 S.W.2d 647, 649 (Tex. 1990). A trial court abuses its discretion only when it acts without reference to guiding rules or principles. Id. To determine whether an alleged error in the jury charge requires reversal, the reviewing court must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety. *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986); *Allen v. Allen*, 966 S.W.2d 658, 660 (Tex. App.--San Antonio 1998, pet. denied). Alleged error will be deemed reversible only if, when viewed in light of the totality of the circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause the rendition of an improper judgment. Tex. R. App. P. 44.1(a)(1); *In re A.V.*, 57 S.W.3d 51, 62 (Tex. App.--Waco 2001, no pet.).

Ganesan complains of the district court's instruction to the jury regarding common law marriage. Section 2.401(a)(2) of the Family Code provides that "the marriage of a man and woman may be proved by evidence that . . . the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married." Tex. Fam. Code Ann. § 2.401(a)(2) (West 1998). The jury instruction in the present case tracks the language of the code: "A man and a woman are married if they agreed to be married and after the agreement they lived together in Texas as husband and wife and there represented to others that they were married." Based on this instruction, the jury found that appellant and Vallabhaneni were married as of February 23, 1995.

The district court rejected the following set of instructions submitted by appellant:

> Living Together in Texas. An agreement to marry in the future, coupled with cohabitation, will not establish a marriage. *Leal v. Moreno*, 733 S.W.2d 322 (Tex. App.--Corpus Christi 1987). Merely living with a person of the opposite sex and having a sexual relationship with that person is not enough to establish a marriage. *Thompkins v. State*, 774 S.W.2d 195 (Tex. Crim. App. 1987).
>
> Representation to Others. The element of representing to others is not satisfied by an occasional uncontradicted reference to a cohabitant as "my wife" or "my husband" or "mine." Such statements will not prove a tacit agreement to be married without corroboration. Statements referencing someone as their "husband" or "wife" made in a self-serving context do not have to be taken as true statements

> when determining if the parties had an agreement to be married. *Russell v. Russell*, 865 S.W.2d 929 (Tex. 1993).
>
> Continuity of Existence of Marriage. One cannot both declare to be single and married. A party cannot drop in and out of marriage based on the financial opportunities or advantages that status presents on different days. *Fuentes v. Transamerica Nat'l Gas Corp.*, 933 S.W.2d 624 (Tex. App.--San Antonio 1996, n.w.h.).[2]

Appellant contends that because the evidence supported the submission of these instructions to the jury, the trial court erred by not giving them. We disagree.

Trial courts are charged with submitting "such instructions and definitions as shall be proper to enable the jury to render a verdict." *St. Joseph Hosp. v. Wolff*, 999 S.W.2d 579, 586 (Tex. App.--Austin 1999, no pet.). The trial court's latitude in this area is even greater than in the area of jury questions. *Oadra v. Stegall*, 871 S.W.2d 882, 889 (Tex. App.--Houston [14th Dist.] 1994, no writ). "If the charge resolves the controlling issues raised by the pleadings and any evidence in a feasible manner that does not confuse the jury, no error occurs." *Connell Chevrolet Co. v. Leak*, 967 S.W.2d 888, 894 (Tex. App.-- Austin 1998, no pet.). In the present case, the district court's instruction made it clear to the jury that it could find the parties were informally married only if it found: (1) an agreement to be married, (2) after the agreement, the couple lived together in Texas as husband and wife, and (3) the couple represented to others that they

[2] Appellant relies on Justice Rickoff's concurring opinion in *Fuentes*.

were married. *See Russell v. Russell*, 865 S.W.2d 929, 932 (Tex. 1993). This instruction is consistent with both the applicable Family Code provision and the Texas Pattern Jury Charge. *See* Tex. Fam. Code Ann. § 2.401(a)(2); Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges* Family PJC 201.4A (2000). As such, we cannot say that the district court's instruction amounted to an abuse of discretion. *St. Joseph Hosp.*, 999 S.W.2d at 586.

Even if the district court's failure to give the instruction constituted error, however, appellant does not contend that the charge amounted to such a denial of his rights as was reasonably calculated and probably did cause the rendition of an improper judgment. *See* Tex. R. App. P. 44.1(a)(1). Ganesan argues his proposed instruction "would have helped the jury evaluate the evidence regarding the parties' agreement [to be married]," and that "[w]ithout the instructions, the jury could minimize or ignore the evidence [that Ganesan and Vallabhaneni contemplated a future marriage]." In effect, Ganesan tendered the instruction so the court could provide the jury guidance on the weight to give the evidence, which would have been an impermissible comment by the trial court. *See* Tex. R. Civ. P. 277. Therefore, any error in the charge does not merit reversal because there has been no showing that it was reasonably calculated and probably did cause rendition of an improper judgment. *See Passons*, 969 S.W.2d at 563. Accordingly, we overrule Ganesan's complaint.

Exclusion of the Evidence

Appellant contends that the district court erred by sustaining appellee's objection to the admission of a letter into evidence. Appellant testified that the letter was sent by Vallabhaneni's mother suggesting an appropriate time for a

formal marriage ceremony. Because appellant could not testify to the fact that the letter was in the mother's handwriting, appellee objected to its admission on the ground that it had not been properly authenticated. The district court sustained the objection.

The admission or exclusion of evidence is committed to the trial court's sound discretion. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). A party seeking to reverse a judgment based on the admission or exclusion of evidence must show that the evidence was erroneously admitted or excluded and that the error probably caused rendition of an improper judgment. *Id.; see also* Tex. R. App. P. 44.1(a)(1); Tex. R. Evid. 103(a). A successful challenge to evidentiary rulings usually requires the complaining party to show the judgment turns on the particular evidence excluded or admitted. *Alvarado*, 897 S.W.2d at 753-54. We determine whether the case turns on the evidence excluded by reviewing the entire record. *Id.* at 753.

The only authority cited by appellant in his discussion of this issue is Texas Rule of Evidence 901(b)(4),[3] which provides that the authentication requirement can be met by "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Tex. R. Evid. 901(b)(4). However, the record reflects that appellant failed to make this argument to the trial court; appellant's response to appellee's objection was limited to the contention that the letter was not being offered for its truth, but as a reflection of the state of mind of appellee's family. Because appellant did not present this argument to

[3] Appellant cites Rule "901(4)"as authority for this contention; we assume he refers to Rule 901(b)(4).

the trial court, he cannot make it on appeal. Tex. R. App. P. 33.1. Accordingly, we overrule the issue.[4]

Legal and Factual Sufficiency of the Evidence

Appellant challenges the factual sufficiency of the evidence supporting the jury's finding that the parties were married. He further challenges the legal and factual sufficiency of the evidence supporting the jury's finding that the parties' informal marriage occurred on February 23, 1995. In his third issue, Ganesan challenges the factual sufficiency of the evidence to support the district court's distribution of the marital estate.

> [W]hen an appellant complains of the factual or legal sufficiency of the evidence, the appellant has the burden to show that the judgment is erroneous, and this burden cannot be discharged in the absence of a complete or agreed statement of facts; rather, "it is presumed that the omitted evidence supports the trial court's judgment."

Kwik Wash Laundries, Inc. v. McIntyre, 840 S.W.2d 739, 741-42 (Tex. App.--Austin 1992, no writ); *see also Englander Co. v. Kennedy*, 428 S.W.2d 806, 807 (Tex. 1968). Because Ganesan failed to file a complete reporter's

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[4] On appeal, appellant restates his argument that the letter should be admitted as a reflection of the family's state of mind; however, appellant cites no authority for his position, and his issue is overruled accordingly. *See* Tex. R. App. P. 38.1(h). In any event, we question how the state of mind of appellee's family is relevant to prove the parties' mutual agreement to be married.

record or agreed statement of the facts, his factual and legal sufficiency challenges must fail. *See id.*[5]

Even in the absence of a complete reporter's record, the partial record before us reflects factually sufficient evidence to support the finding that the parties were informally married, as well as the district court's division of marital property. The record further reflects legally and factually sufficient evidence to support the finding that the parties' informal marriage occurred on February 23, 1995. To review the evidence under a no-evidence point, we consider all the evidence in the light most favorable to the prevailing party, indulging every reasonable inference in that party's favor. *Leal v. Texas Dep't of Protective & Regulatory Servs.*, 25 S.W.3d 315, 321 (Tex. App.--Austin 2000, no pet.). We will uphold the finding if more than a scintilla of the evidence supports it. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex.

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[5] While appellant does not make the argument, we note that *Englander* and *McIntyre* predate current Rule of Appellate Procedure 34.6(c)(4), which provides:

> The appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual insufficiency of the evidence to support a specific factual finding identified in that point or issue.

Tex. R. App. P. 34.6(c)(4). One court of appeals has observed, "Rule 34.6(c) allows appellant to request a partial reporter's record in order to minimize the expense and delay associated with the appellate process." *Jaramillo v. Atchison, Topeka & Santa Fe Ry. Co.*, 986 S.W.2d 701, 702 (Tex. App.--Eastland 1998, no pet.). Ganesan did not designate a partial reporter's record, and the policy consideration of minimizing expense and delay does not apply here. Because appellant simply neglected to request or preserve the reporter's record, Rule 34.6(c)(4) is not applicable.

1965); *In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951). The evidence supporting a finding amounts to more than a scintilla if reasonable minds could arrive at the finding given the facts proved in the particular case. *Id.; Brigham v. Brigham,* 863 S.W.2d 761, 762 (Tex. App.--Dallas 1993, writ denied).

When reviewing a jury verdict to determine the factual sufficiency of the evidence, we must consider and weigh all the evidence and should set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); Leal, 25 S.W.3d at 321; *Brigham*, 863 S.W.2d at 762-63. We will not substitute our judgment for that of the trier of fact merely because we reach a different conclusion. *Leal*, 25 S.W.3d at 321.

As the basis for his challenge to the finding that the parties were informally married, appellant refers to his trial testimony in which he indicates that he only agreed to a future marriage to Vallabhaneni and recounts the occasions on which their attempts to be formally married failed. Appellant also points to the testimony of Kevin Leverenz, a police officer with the Austin Police Department. Leverenz testified that he responded to a domestic disturbance call at appellant's residence in August 1995 and that appellee repeatedly complained that Ganesan had brought her to Austin under false pretenses of becoming his wife. Ganesan further points to appellee's immigration documentation in which she holds herself out as single. Appellant dismisses all other conflicting evidence in the record as "indirect" and concludes that "[i]n the absence of Vallabhaneni's testimony, the evidence of record surely preponderates against the jury's finding that there was a common law marriage."

Appellee responds by providing numerous citations to the record before us which indicate the existence of an informal marriage, including the following: (1) Ganesan testified under oath in a deposition in November 1995 that appellee was his common law wife; (2) Ganesan referred to appellee as his wife in a letter signed by both parties; (3) appellee referred to Ganesan as her husband in a letter to the Consulate General of Switzerland; and (4) appellee referred to Ganesan as her common-law husband in her request for protective order. After reviewing the evidence contained in the incomplete record, we cannot say that the judgment is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Accordingly, we overrule appellant's issue.

Appellant contends that the evidence is legally and factually insufficient to support the jury's finding that the parties' informal marriage occurred on February 23, 1995. However, it is undisputed that the parties began living together in Austin during the third week of February 1995. Accordingly, we conclude that there is more than a scintilla of evidence to support the jury's finding, and we cannot say that the judgment is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust; therefore, we overrule appellant's complaint.

Appellant contends that the evidence is factually insufficient to support the district court's finding that he failed to overcome the presumption of community property as to certain retirement and brokerage accounts and a ranch. "Property possessed by either spouse during or on dissolution of marriage is presumed to be community property." Tex. Fam. Code Ann. § 3.003(a) (West 1998). "The degree of proof necessary to establish that property is separate property is clear and convincing evidence." *Id.* § 3.003(b) (West

1998). Clear and convincing evidence is the degree of proof that will produce in the mind of the trier of fact a firm belief or conviction about the allegations sought to be established. *See Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965); *Ellebracht v. Ellebracht*, 735 S.W.2d 658, 659 (Tex. App.--Austin 1987, no writ). To overcome this presumption, the spouse claiming separate property must trace and clearly identify the property claimed to be separate. *See Whorall v. Whorall*, 691 S.W.2d 32, 35 (Tex. App.--Austin 1985, writ dism'd) (citing *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973)). Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property. *See id.*

The record reflects that the only evidence appellant provided was his own testimony that he had certain accounts prior to his marriage to Vallabhaneni, out of which he made payments for the ranch, and several exhibits purporting to establish the separate nature of those accounts. However, Ganesan's testimony is limited to naming the institutions holding his accounts; neither his testimony nor the exhibits provide account numbers, statements of accounts, dates of transfers, amounts transferred in or out, sources of funds, or any semblance of asset tracing. The burden to overcome the statutory presumption was on Ganesan, and we cannot say that the district court's failure to find that he overcame the community property presumption is contrary to the overwhelming weight of the evidence so as to be clearly wrong and unjust. Accordingly, his issue is overruled.

Finally, appellant challenges the trial court's division of marital property. In the divorce decree, the trial court has the duty to order a just and right division of the parties' estate, having due regard for the rights of each spouse. Tex. Fam.

Code Ann. § 7.001 (West 1998). Appellant contends that there is insufficient evidence to support the district court's division of the community estate based on any disparity in income or earning potential. However, appellant does not point to and we are unaware of any indication in the district court's judgment or findings of fact and conclusions of law that the trial court's division of the property was based on disparity in income or earning potential. As such, we overrule his complaint.

CONCLUSION

We overrule all of Ganesan's complaints on appeal. We therefore affirm the judgment of the district court.

Marilyn Aboussie, Chief Justice

Before Chief Justice Aboussie, Justices Yeakel and Puryear

Affirmed

Filed: March 21, 2002

Publish

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NO. 96-14089

IN THE MATTER OF MARRIAGE OF	§	IN THE DISTRICT COURT,
	§	353RD JUDICIAL
SUDHA VALLAHHANENI AND APPARAJAN GANESAN	§	DISTRICT,
	§	TRAVIS COUNTY,
	§	TEXAS

INTERLOCUTORY JUDGMENT

On September 8, 1997, the Court took up for hearing the captioned cause.

Petitioner. SUDHA VALLABHANENI, appeared in person and by attorney of record AMY C. WRIGHT.

Respondent, APPARAJAN GANESAN, appeared in person and by attorney of record, WADE WILSON.

The record of testimony was duly reported by Betty Haygood, the court reporter for the 250th court.

By prior order of the court, issues presented in the captioned cause have been bifurcated for trial. Evidence and argument only an the matter of the existence of an informal marriage were taken up try the Court on September 8, 1997. All other issues, including the issue of attorneys'' fees, were reserved for further proceedings in the cause.

A jury was selected, all questions of fact were submitted to the jury, and a verdict was returned and duly filed.

The Court enters judgment on the Jury's verdict as follows:

Sudha, Vallabhaneni and Apparajan Ganesan were married at common law on February 23, 1995.

SIGNED on 1-20, 1998.

Signed:// John K. Dietz
JOHN DIETZ, District Judge

APPROVED AS TO FORM:

WRIGHT & LUNGWTIZ, P. C.
Attorneys at Law
109 E. 10th Street, Suite 200
Austin, Texas 73701-2419
Telephone: (512) 494-9000
Facsimile: (512) 494-8769
Signed:// Amy C. Wright
AMY C. WRIGHT
State Bar No. 22020750
Attorney for Petitioner

LAW OFFICE OF WADE WILSON
Attorney at Law
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Austin, Texas 78701
Telephone: (512) 473-8373
Facsimile: (512) 472-1808
Signed:// Wade Wilson
WADE WILSON
State Bar No. 217 27700
Attorney for Respondent

GEORGE, DONALDSON & FORD
Attorneys at Law
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_____
Ben J. Cunningham
State Bar No. 05231950
APPROVED AS TO FORM:

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Signed:// B. J. Cunningham
Ben J. Cunningham
State Bar No. 05231950

NO. 96-14089

IN THE MATTER OF MARRIAGE OF	§ §	IN THE DISTRICT COURT,

	§	353RD JUDICIAL
SUDHA VALLAHHANENI	§	DISTRICT,
AND	§	TRAVIS COUNTY,
APPARAJAN GANESAN	§	TEXAS

FINAL DECREE OF DIVORCE

Bifurcation of Trial

The trial of this cause was previously ordered to be bifurcated. The initial hearing was ordered to determine the disputed issue of the existence of an informal marriage. In the event an informal marriage was found to exist, evidence and argument on all other issued would be heard at a subsequent trial.

I.
Judgment on Existence of a Marriage

1. Date of Hearing

On September 8, 1997, came on the be heard evidence and argument only on the matter of the existence of an informal marriage, District Judge John Dietz presiding.

2. Appearances

Petitioner, SUDHA VALLABHANENI, appeared in person and through attorney record. Amy C. Wright, and announced ready for vial.

Respondent, APPARAJAN GANESAN, appeared in person and through attorney of record, Wade Wilson.

3. Record

The record of testimony was duly reported by Betty Haygood, the court reporter for the 250th Court.

4. Jury

A jury *was selected, all questions of* fact were submitted to the jury, and a verdict was returned and duly filed.

5. Judgement

The Court entered judgement on the Jury's verdict as follows:

SUDHA. VALLABHANENI and APPARA.JAN GANESAN were married at common law on *February 23, 1995.*

The Honorable John Dietz, District Judge of the 250th Judicial District Court, signed a judgement related to said finding by the jury, by order dated January 20, 1998.

All other issues, including the division of property and attorney's fees, were taken up at the final hearing mid the Court entered the following Orders:

II.
Judgment on All Other Issues

1. Date of Final Hearing

On November 6,2000, came to be heard evidence and argument on all other issues remaining in this cause of action, including the division of property and attorney's fees.

2. Appearances

Petitioner, SUDHA VALLABHANENI, appeared in person and through attorney record. William D. Powers, and announced ready for trial.

Respondent, APPARAJAN GANESAN, appeared in person and through attorneys of record, W. W. McNeal and Tim Whitten, and announced ready for trial.

3. Record

The record *of* testimony was duly reported by Jack L. Fuller, Certified Shorthand Reporter, 2702 5. Bagdad Rd., #127, Leander, Texas 78641.

4. Jurisdiction and Domicile

The Court finds that the pleadings of Petitioner are in due form and contain all allegations, information, and prerequisites required by law. The Court after receiving evidence, finds that it has jurisdiction of this case and of all the parties and that at least sixty days have elapsed since the date the suit was filed. The Court finds that, at the time the suit was filed, Petitioner had been a domiciliary of Texas for the preceding six-month period and a resident of the county in which this suit was filed for the preceding ninety-day period. All persons entitled to citation were properly cited.

5. Jury

A jury was waived and all facts of law were submitted to the Court.

6. Divorce

IT IS ORDERED AND DECREED that SUDHA VALLABHANENI, Petitioner, is granted a divorce from APPARAJAN GANESAN, Respondent, and the marriage between then is dissolved on the grounds of cruelty and conviction of felony.

7. Child of the Marriage

The Court finds that there is no child of the marriage of petitioner and Respondent and that none is expected.

8. Division of Marital Estate

The Court finds that the following is a just and right division of the parties' marital estate, having due regard for the rights of each party.

Property to Husband

IT IS ORDERED AND DECREED that the husband, APPARAJAN GANESAN, is awarded the following as his sole and separate property, and the wife is divested of all right, title, interest, and claim in and to that property:

H-1. The following real property, including but not limited to any escrow funds, prepaid insurance, utility deposits, keys, house plans, home security access and code, garage door opener, warranties and service contract., and title and closing documents:

a. 9005 South FM 973 S
Austin, Travis County, Texas 78719
15.43 Acres ABS 479, Survey 2, Lewis W

Travis County, Texas

H-2. All household furniture, furnishings, fixtures, goods, art objects, collectibles, appliances, and equipment in the possession of the husband or subject to his sole control.

H-3. All clothing, jewelry, and other personal effects in the possession of the husband or subject *to his sole* control.

H-4. All sums of cash in the possession of the husband or subject to his sole control, including funds on deposit, together with accrued but unpaid interest, in banks, savings institutions, or other financial institutions, which accounts stand in the husband's sole name or from which the husband has the sole right to withdraw funds or which are subject to the husband's sole control.

H-4. All sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any profit-sharing plan, retirement plan. Keogh plan, pension plan, employee stock option plan, 401 (k) plan, employee savings plan, accrued unpaid bonuses, disability plan, or other benefits existing by reason of the husband's past, present, or future employment, **including** but not limited to:

a. Cirrus 'Logic 401K pension Plan Account #078588917.

H-5. All individual retirement accounts, simplified employee pensions, annuities, and variable annuity life insurance benefits in the husband's name, save and except

those specifically awarded to SUDHA VALLABHANENI, herein:

H-6. All policies of life insurance (including cash values) insuring the husband's life.

Property to Wife.

IT IS ORDERED AND DECREED that the wife, SUDHA VALLABHANENI, is awarded the following as her sole and separate property, and the husband is di vested of all right, title, interest, and claim in and to that property:

W-1. All household furniture, furnishings, fixtures, goods, art objects, collectibles, appliances, and equipment in the possession of the wife or subject to her sole control.

W-2. All clothing, jewelry, and other personal effects in the possession of the wife or subject to her sole control.

W-3. All sums of cash in the possession of the wife or subject to her sole control, including funds on deposit, together with accrued but unpaid interest, in banks, savings institutions, or other financial institutions, which accounts stand in the wife's sole name or from which the wife has the sole right to withdraw funds or which are subject to the wife's sole control.

W-4. All sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any profitsharing plan, retirement plan, Keogh plan, pension plan, employee stock option plan, 401(k) plan, employee savings plan, accrued unpaid bonuses, disability

plan, or other benefits existing by reason of the wife's past, present, or future employment.

W-5. All individual retirement accounts, simplified employee pensions, annuities, and variable annuity lire insurance benefits in the wife's name.

W-6. The following IRA accounts currently held in the name of APPARAJAN GANESAN:

a. Charles Schwab SEP/IRA Account #2681-4260; and
b. Charles Schwab SEP/IRA Account #2681-4255.

IT IS ORDERED AND DECREED that Charles Schwab shall take all steps and measures necessary to transfer said funds in to SUDHA VALLABHANENI's name.

W-7. $12,960.81 from the MR. Block IRA Account #B6207898999, currently held in the name of APPARAJAN GANESAN.

IT 1S ORDERED AND DECREED that H&R Block shall take all steps and measures necessary to transfer said funds in to SUDHA VALLABHANENI's name.

W-8. All policies of life insurance (including cash values) insuring the wife's life.

W-9. All brokerage accounts, stocks, bonds, mutual funds, and securities registered in the wife's name, together with all dividends, splits, and other rights and privileges in connection with them.

W-10. All motor vehicles, titled in the wife's name, together with all prepaid insurance, keys, and title documents.

Attorney's Fee.

The court finds that S UDHA VALLABHANENI has incurred $25,000.00 as attorney's fees, which were necessary as support for SUDHA VALLABHANENI. IT IS ORDERED that SUDHA VALLABHANENI is awarded a judgement of $25,000.00 against APPARAJAN GANESAN as attorney's fees and expenses, with interest at 10 percent per year compounded annually from date of signing of this Final Decree of Divorce until paid, for which let execution issue.

Attorney's Fees on Appeal.

IT IS FURTHER ORDERED AND DECREED that SUDHA VALLABHANENI is awarded a judgement of $5,000.00 against APPARAJAN GANESAN for attorney's fees on appeal for the benefit of attorney, William D. Powers, together with all costs and expenses. The judgement shall bear interest at 10 percent per year compounded annually from the date of judgement, for which let execution issue.

1T IS FURTHER ORDERED AND DECREED that the judgement of attorney's fees on appeal rendered against APPARAJAN GANESAN is conditioned on the pursuit of an ultimately unsuccessful appeal.

Confirmation of Separate Property

IT IS ORDERED AND DECREED that the following described property is confirmed as the separate property of SUDHA VALLABHANENI:

1. Trust account in the name of S UDHA VALLABHANENI, established from the funds acquired per the bankruptcy settlement in Case No. 98-10295 FM-7, Chapter 7, In the United State Bankruptcy Court, Western District of Texas, Austin Division;

2. Brokerage account and subaccount in the name of SUDHA VALLABHANENI, established from funds transferred from trust account, which is more specifically described in enumerated separate property item number one (1);

3. Brokerage account in the name of SUDHA VALLABHANENI, established from funds transferred from trust account, which is more specifically described in enumerated separate property item number one (1);

4. Vehicle titled in the name of SUDHA VALLABHANENI, together with all prepaid insurance, keys, and title documents, purchased with funds from trust account, which is more specifically described in enumerated separate property item number one (1);

5. Vehicle titled in the name of SUDHA VALLABHANENI, together with all prepaid insurance, keys, and title documents, purchased prior to marriage;

6. Parcel of land in India, purchased prior to marriage;

7. Brokerage account, acquired prior to marriage, through wife's employment with Sun Microsystems;

8. IRA account, acquired prior to marriage, through wife's employment with Sun Microsystems;

9. All household furniture, furnishings, fixtures, goods, art objects, collectibles, appliances, and equipment in the possession of the wife or subject to her sole control; and,

10. All clothing, jewelry, and other personal effects in the possession of the wife or subject to her sole control.

Liability for Federal Income Taxes from Date of Marriage through Year of Divorce.

The Court finds that the parties have filed separate federal income tax returns since the date of marriage and have never filed jointly.

IT IS ORDERED AND DECREED that SUDHA VALLABHANENI shall be solely responsible for her own federal income tax liabilities from the date of marriage through the year of divorce, and shall timely pay any deficiencies, assessments, penalties, or interest due thereon and SUDHA VALLABHANENI shall indemnify and hold APPARAJAN GANESAN and his property harmless therefrom unless such additional tax, penalty, and/or interest resulted from SUDHA VALLABHANENI's omission of taxable income or claim of erroneous deductions. In such case, the portion of the tax, penalty, and/or interest relating to the omitted income or claims of erroneous deductions shall be paid by SUDHA VALLABHANENI.

IT IS ORDERED AND DECREED that APPARAJAN GANESAN shall be solely responsible for his own federal income tax liabilities from the date of marriage through the year of divorce, and shall timely pay any deficiencies, assessments, penalties, or interest due thereon and APPARAJAN GANESAN shall indemnify and hold SUDHA VALLABHANENI and his property harmless there from unless such additional tax, penalty, and/or interest resulted from APPARAJAN GANESAN's omission of taxable income or claim of erroneous deductions, In such case. the portion of the tax, penalty, and/or interest relating to the omitted income or claims of erroneous deductions shall be paid by APPARAJAN GANESAN.

Treatment/Allocation of Community Income for Year of Divorce.

IT IS ORDERED AND DECREED that, for the calendar year 2000, each party shall file a separate federal income tax return and, as part of the division of the estate of the parties, each party, relying on Section 66, internal Revenue Code of 1954, as amended, shall report al l income earned by that party in 2000 and shall claim all prepayments, withholdings, and deductible expenses actually paid by the reporting parry in that calendar year.

Petitioner shall timely pay, indemnify, and hold Respondent and his property harmless for any tax liability, and shall be entitled to claim any tax refund for overpayment of taxes, on her separate return calculated in the above manner. Respondent shall timely pay, indemnify, and hold Petitioner and her property harmless for any tax liability, and shall be entitled to claim any tax refund for overpayment of taxes, on his separate return calculated in the above manner.

No Alimony.

IT 1S ORDERED AND DECREED that no provision of this decree shall be construed as alimony under the Internal Revenue Code, except as this decree expressly provides for payment of maintenance or alimony under the Internal Revenue Code.

9. Court Costs

IT IS ORDERED AND DECREED that costs of court are to be borne by the party who incurred them.

10. Discovery Retention Requirement

IT IS ORDERED AND DECREED that any persons required to serve discovery materials shall, maintain, for a period of 12 months after this judgement is signed, the originals or exact copies of all discovery materials produced during the pendency of this matter and not filed with the Court.

If an appeal is **begun within** that I2-month period, IT IS FURTHER ORDERED AND DECREED that the discovery materials shall be maintained while the appeal is pending.

11. Clarifying Orders

Without affecting the finality of this Final Decree of Divorce, this Court expressly reserves the right to make orders necessary to clarify and enforce this decree.

12. Relief Not Granted

IT IS ORDERED AND DECREED that all relief requested in this case and not expressly granted is denied.

SIGNED ON February 21, 2001 at 2:15 P .M.

Signed:// Margaret A. Cooper
HONORABLE MARGARET COOPER
PRESIDING

APPROVED AS TO FORM ONLY:

PIPER & POWERS, L.L.P.
2206 Lake Austin Blvd.
Austin, Texas 78703
(512) 472-5060
(512) 472-5427 FAX

By: _____
William D. Powers
State Bar No. 16218900

Attorney for Petitioner,
SUDHA VALLABHANENI

McNEAL, GARNER & LIPPE, P.L.L.C.
Post Office Box 1259
Lockhart, Texas 78644
(512) 376-4534
(512) 398-9604 FAX

By: _____
W. W. McNeal
State Bar No. 13820000
Tim Whitten
State Bar No. 21391300

Attorneys for Respondent,
APPARAJAN GANESAN

NO. 03-01-00288-CV
IN THE COURT OF APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT AUSTIN, TEXAS

APPARAJAN GANESAN, Appellant
v.
SUDHA VALLABHANENI, Appellee

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE THIRD COURT OF APPEALS:

Appellant, Apparajan Ganesan, submits this motion for rehearing in response to the opinion issued by the Court on March 21, 2002, and requests that the Court consider the following issues:

ISSUES PRESENTED FOR REVIEW

Issue 1: The Court erred in finding that there was no authority for the proposition that appellant's bankruptcy proceeding stayed the limitations period for his record request.

The Court notes that appellant conceded he was unable to provide authority for the proposition that his bankruptcy proceeding stayed the limitations period for his request for a transcript of the jury trial from the court reporter. Op., p. 3, n. 1. That is the extent of consideration, at least so far as the opinion reflects, of appellant's argument against his fault in the record's incompleteness. However, appellant relied on the statutory authority of the Bankruptcy Code and on the argument that the trustee retained the right to Ganesan's interest in the reporter's notes until the bankruptcy case was

terminated in December 2000, which was three years after the jury trial and in the month when the court reporter testified in her affidavit she may have destroyed her notes. Brief, p. 16.

Issue 2: The Court erred in finding that there was no harmful error in the trial court's failure to submit appellant's requested instructions to the jury.

The question with respect to the *jury* charge is whether the trial court's failure to accept the instructions appellant requested amounted to a denial of his right to a fair trial. Appellant submits that the question turns on the totality of the circumstances and, in particular, whether the evidence at trial required, in the interest of fairness, instructions that go beyond the statutory language of Tex. Fam. Code Ann. § 2.401(a)(2) and the general instruction of Texas Pattern Jury Charge. Obviously, there are circumstances where additional instructions should be given, and appellant submits that they are present in this case because of the welter of conflicting testimony, on both sides, on the issue of the agreement to be married.

If Appellant has read the court's opinion correctly, he must suggest, respectfully, that the court gave this issue rather short shrift. The court dismisses his argument with the conclusion that "appellant does not contend that the charge amounted to such a denial of his rights as was reasonably calculated and probably did cause the rendition of an improper judgment," citing Tex. R. App. P. 44.1(a)(1), and with the suggestion that all appellant's argument comes to is an effort to have the trial court, through the requested instructions, make an impermissible comment on the weight the jury should give the evidence. Op., p. 6.

That was hardly appellant's intent. Appellant argued that the failure to submit the requested instructions was "harmful error" and tried to suggest that, under circumstances where the nature of the agreement was fairly paramount as a result of the conflicting testimony of both parties, the harm was that the jury could not have evaluated the evidence, and answered the question before it, in light of applicable law. For this reason, appellant cited *Russell v. Russell, 865 S.W 2d* 929, 933-34 (Tex. 1993), to show that evidence of an agreement to be married was necessary and not merely evidence of cohabitation and public representation with a subsequent inference of the agreement. Brief, p. 23.

Issue 3: The Court erred finding that there was no harmful error in the trial court's sustaining the objection to the admission of appellee's mother's letter concerning a date for the parties' marriage.

Appellee's mother's letter would have been an important piece of evidence. Appellant submits that the issue is whether he preserved his right to appeal the exclusion of the letter by his response to appellee's objection as to authentication, which was that the letter reflected her family's state of mind about the couple's plans to get married. On appeal, Appellant did not argue that the letter should be admitted as a reflection of the family's state of mind. Cf. Op., p. *8,* n. 4. Appellant argues instead that even if trial counsel did not cite Tex. R. Ev. 901(b)(4), his response to the objection preserved the error because the family's state of mind, shown by the contents of the letter, meets the authentication requirement by "contents [and] substance, taken in conjunction with circumstances." In the letter appellee's

mother addressed the central issue of the trial, whether (and when) the couple would marry. It was obviously important and, appellant submits, should have been admitted.

For the reasons stated above, appellant asks the Court to grant this motion for rehearing, withdraw its opinion, and reverse and remand for a new trial.

Respectfully submitted,

VON KREISLER & SWANSON, P.C.
919 Congress Avenue, Suite 1000
Austin. Texas 78701
(512)472-1494
Facsimile: (512)478-4936
By: signed// N. v. Kreisler
Nicolai von Kreisler
State Bar No. 2061650

ATTORNEYS FOR APPARAJAN GANESAN, APPELLANT

CERTIFICATE OF CONFERENCE

Pursuant to Tex. R. Civ. App. 10.1(a)(5), the undersigned has conferred with counsel about the foregoing motion and counsel opposes the motion.

Signed//: N. v. Kreisler
Nicolai von Kreisler

CERTIFICATE OF SERVICE

Signature below certifies that a true and correct copy of the above and foregoing Appellat's Brief has been served by certified mail, return receipt requested, on this 5th day of April, 2002 to:

William D. Powers
Receipt No. 7001 0360 0001 0239 4134
Piper & Powers, L. L. P..
2206 Lake Austin Blvd. Austin, Texas 78703

Elizabeth G. Bloch
Receipt No. 7001 0360 0001 0239 4141
Hilgers & Watkins, P.C.
98 San Jacinto Blvd.
Suite 1300, San Jacinto Center P.O. Box 2063
Austin, Texas 78768-2063

Signed//: N. v. Kreisler
Nicolai von Kreisler

Appendix F – Chronology of Vallabhaneni's Declarations of Being Single

ATTACHMENT 1

Alleged Common Law Period Time Line

	Sept 94	First phone contact between the parties
Vallabhaneni (SV) claims ceremonial marriage. Claim is refuted by Temple priest.	Oct 94	
	Nov 94	
	Dec 94	
	Jan 95	
H&R Block in Calif. files SV's taxes as a "single." SV's mother writes letter suggesting June 1995 marriage.	Jan 95	
Vallabhaneni gets auto insurance as a single. Vallabhaneni moves to Austin, TX. Vallabhaneni applies for UK visa as a single.	Feb 95	Cohabitation begins
Vallabhaneni get bank	Mar 95	

account as a single.

Vallabhaneni swears to INS she is single. Apr 95

SV and Ganesan visit India. Ganesan does NOT stay at SV's mother's house Because they are NOT Married. May 95

Jun 95

Vallabhaneni renews Calif. driver's license and auto insurance as a single. Jul 95

Aug 95

Sept 95

Vallabhaneni takes job and tells employer she is single. Oct 95

Nov 95

Vallabhaneni opens bank account as single. Dec 95

Jan 96

Vallabhaneni introduced at ISSCC '96 as being single. Feb 96

3F

Mar 96

Apr 96

May 96

Vallabhaneni renews passport as a single. — Jun 96

Jul 96

Vallabhaneni attends wedding as a single. — Aug 96

Sept 96 — Cohabitation ends

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1G

LAW OFFICES
VON KREISLER & SWANSON
A PROFESSIONAL CORPORATION
610 WEST LYNN AUSTIN, TEXAS 78703
(512) 472-1494 TELEFAX--(512) 478-4936
November 27, 2002

Apparajan Ganesan
c/o Douglas Marsh
1031 Graham Street
Bethleham, PA.13015

Apparajan Ganesan
Sanders Estes Unit
1100 Hwy. 1807

Venus, Texas 76084

Re: INS agent's testimony and 2001 exams of the IRS agent

Dear Mr. Ganesan:

Enclosed please find the testimony of Rob Reyes, the INS agent and the exhibits that where introduced during his testimony.

We do not have the 2001 exams of the IRS agent. You might inquire with Karen Hill, she picked up the boxes pertaining to your case.

Very truly yours,

VON KREISLER & SWANSON, PC

Signed//: Molly Doherty

2G

Molly Doherty
Legal Assistant to Nicolai von Kreisler

Enclosure

3G

RESIDENT ALIEN

U.S.DEPARTMENT OF JUSTICE-IMMIGRATION AND NATURALIZATION SERVICE

VALLABHANENI,SUDHA L
NAME

08 01 57
004

THUMB PRINT HERE

PHOTO HERE

A070778592
ALIEN NUMBER

11 24 03
CARD EXPIRES

Signed//: V L Sudha

ALIEN REGISTRATION RECEIPT CARD
PERSON IDENTIFIED BY THIS CARD ENTITLED TO RESIDE PERMANENTLY AND WORK IN THE U.S.

E37 SFR 930407 247 3307468035

A1USA070778592<01<9311<<<<<<<<<<<<
5708013F0311247<<<<<<<<<<<EA181FE66
VALLABHANENI<<SUDHA<L<<<<<<<<<

U.S. Department of Justice
Immigration and Naturalization Service

AFFIDAVIT OF SUPPORT

(ANSWER ALL ITEMS : FILL IN WITH TYPEWRITER OR PRINT IN BLOCK LETTERS IN INK)

1. SUDHA VALLABHANENI residing at 8820 LEO ST
(Name) (Street and number)
AUSTIN TX 78745 USA
(city) (State) (Zip Code if in U.S.) (Country)

BEING DULY SWORN DEPOSE AND SAY:
1. I was born on 1st AUG 1957 at KURNOOL INDIA
(Date) (City) (Country)
If you are not a native born United States citizen, answer the following as appropriate :
a. If a United States citizen through naturalization, give certificate of naturalization number _____
b. If a United States citizen through parent(s) or marriage, give citizenship certificate number _____
c. If United States citizenship was derived by some other method, attach a statement of explanation.
d. If a lawfully admitted permanent resident of the United States, give "A" number A070778592
2. That I am 37 years of age and have resided in the United States since (date)19 JAN 1989.
3. That this affidavit is executed in behalf of the following person.

Name DEEPIKA PAVULURI Sex F Age 14
Citizen of (Country) INDIA Marital Status SINGLE
Relationship to Deponent DAUGHTER

Presently resides at (Street and Number) 9A RUKMINI DEVIETN, W. HARRED PALLY, (City) SECUNDERABA 500 026 (State) AP (Country) INDIA

Name of spouse and children accompanying or following to join person: NOT APPLICABLE

Spouse	Sex	Age	Child	Sex	Age
Child	Sex	Age	Child	Sex	Age
Child	Sex	Age	Child	Sex	Age

4. That this affidavit is made by me for the purpose of assuring the United States Government that the person(s) named in item 3 will not become a public charge in the United States.
5. That I am willing and able to receive, maintain and support the person(s) named in item 3. That I am ready and willing to deposit a bond, if necessary, to guarantee that such person(s) will not become a public charge during his or her stay in the United States, or to guarantee that the above named will maintain his or her nonimmigrant status if admitted temporarily and will depart prior to the expiration of his or her authorize stay in the United States.

6. That I understand this affidavit will be binding upon me for a period of three (3) years after entry of the person(s) named in item 3 and that the information and documentation provided by me may be made available to the Secretary of Health and Human Services and the Secretary of Agriculture who may make it available to a public assistance agency.

7. That I am employed as, or engaged in the business of
SOFTWARE ENGINEERING
(Type of Business)

with GANESAN CONSULT
(Name of Concern)

at 8820 LEO ST AUSTIN TX 78745
(Street and Number) (City) (State) (Zip Code)

I derive an annual income of (if self employed, I have attached a copy of my last income tax return or report of commercial rating concern which I certify to be true and correct to the best of my knowledge and belief. See instruction for nature of net worth to be submitted. $ 69445

I have on deposit in savings banks in the United States $ 16710

I have other personal property, the reasonable value of which is $ 29000

I have stocks and bonds with the following market value, as indicated on the attached list which I certify to be true and correct to the best of my belief $ ____.

I have life insurance (n the sum of $ ____.
With a cash surrender value of $ ____.
I own real estate valued at $ ____.
With mortgages or other encumbrances thereon amounting to $ ____.

Which is located at _____
(Street and Number) (City) (State) (Zip Code)

8. That the following persons are dependent upon me for support : (Place an "X" in the appropriate column to indicate whether the person named is wholly or partially dependent upon you for support.)

Name of person	Wholly Dependent	Partially Dependent	Age	Relationship to me
DEEPIKA PAVULURI	X		14	DAUGHTER

9. That I have previously submitted affidavit(s) of support for the following person(s) if none, state "None"

Name	Date Submitted
NONE	

10. That I have submitted visa petition(s) to the Immigration and Naturalization Service on behalf of the following person(s). If none, state None

Name	Relationship	Date Submitted
NONE		

11. (Fill in this block only if the person named in item 3 will be in the United States temporarily). That I [_] intend [_] do not intend, to make specific contributions to the support of the person named In item 3. If you check "do intend", indicate the exact nature and duration of the contributions For example, if you intend to furnish room and board, state for how long and, if money, state the amount in United States dollars and state whether it is to be given in a lumpsum, weekly, or monthly, or for how long).

NOT APPLICABLE

OATH OR AFFIRMATION OF DEPONENT

I acknowledge that I have read part III of the Instructions, Sponsor and Alien Liability and am aware of my responsibilities as an Immigrant sponsor under the Social

Security Act, as amended, and the Food Stamp Act, as amended:

I swear (affirm) that I know the contents of this affidavit signed by me and the statements are true and correct.
Signature of deponent signed:// V Sudha

Subscribed and sworn to (affirmed) before me this 12th day of JUNE ,1995 at _____. My commission expires on _____.

Signature of Officer Administering Oath_____Title_____

If affidavit prepared by other than deponent, please complete the following : I declare that this documents was prepared by me at the request of the deponent and is based on all information of which I have knowledge.

_____

(Signature) (Address) (Date)

FULL TESTMONY OF INS AGENT RON REYES

BOLD type font is placed by the petitioner

(In the presence of the Jury)
THE COURT: Mr. Wilson?
MR. WILSON: All right.

ROB REYES, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Would you please state your name?
A Yes, my name is Rob Reyes.
Q Mr. Reyes, where do you live?
A I live in San Antonio, Texas.
Q And how are you employed?
A I'm a special agent with the United States Immigration and Naturalization Service.
Q Okay. In conjunction with your position, do you have possession and control over documents of Ms. Sudha Vallabhaneni?
A Yes, sir, I do.
Q Okay. Have you brought the original file of those documents with you?
A Yes, I have them.
Q Okay. And do you have any documents submitted by Mrs. Vallabhaneni to Immigration and Naturalization Services on which she indicated her marital status?
A Yes, I have the complete file.
Q Okay. And what was that marital status, sir?
A She indicated she was a widow.

Q Okay. And when was that? Do you remember when she originally applied?

THE COURT: Are you asking when the document was generated?

MR. WILSON: Yes, sir. He has the original of these, Your Honor. Let's mark this, please.

Q I'm going to show you what's been marked as Respondent's Exhibit No. 12. Is that a duplicate of the original that you have in your file, sir?

A Yes, it is. This is a copy of the original.

Q Okay. And is there anything on this original document that indicates the marital status of Ms. Vallabhaneni?

A Yes. In Block No. 3, where it says **"Marital Status,"** it indicates that she's a **widow**.

Q Okay. And when was that generated, sir?

A The approval date was November 25th, 1994.

Q Thank you.

MR. WILSON: I'd like to offer what's been marked as Respondent's Exhibit No. 12, Your Honor.

THE COURT: Any objection?

MS. WRIGHT: May I take the witness on voir dire, Your Honor?

VOIR DIRE EXAMINATION

BY MS. WRIGHT:

Q The document that you've been shown, sir, has a notation "Following to join daughter, Deepika" -

A Yes.

Q -- "Pavuluri." Is this approval date -- does that relate to Deepika Pavuluri, or does that relate to the whole document, the original document that was filed?
A That particular approval relates to Deepika. However, that date has to -- the information in the document has to be original as to the initial documentation that was submitted during the initial process.
Q And the original application was submitted when?
A The original application, the same form, was submitted October 1st, 1993. But the approval dates were September 7th, '93, and then that date also.
Q Let me just make sure I understand this. This document was originally created sometime before September 7th, 1993. Is that right?
A 1993.
Q And then it was approved on September 1993. Is that right?
A Yes. The approval date was for Sudha.
Q Okay. And then there was an approval in November, on November 25th, 1994 for the daughter, Deepika. Is that right?
A That's correct.
Q Okay. So this document was not generated in 1994. It was 1993. But you're saying that the information had to be correct as of the later date as well?
A That's correct.

MS. WRIGHT: No further questions, Your Honor. And no objection.
THE COURT: Admitted.
(Respondent's Exhibit No. 12 admitted.)

DIRECT EXAMINATION RESUMED

BY MR. WILSON:

Q And in fact, was there a correction made to this document as late as November 25th, 1994?
A The original document and the document that you showed me just now is the same. The only difference would be the approval dates for the daughter.
Q Would there have been **required** that Ms. Vallabhaneni **make** any changes to her original application, such as change of address or **marital status**?
A **Absolutely.** Yes, sir.
Q And was that done?
A **No**, it was not.
Q Did she make any changes whatsoever?
A None at all.
Q Did she make changes to her address at any point?
A **There was an address change** submitted to us.
Q Okay. And what was that address change, sir?
A It was an address change that took place while they were residing in California. I have the form here.
Q Is this a copy of the form? This is the letter from her?
A Yes, it is.

MR. WILSON: Can I mark this, please?

Q I'm going to show you now what's been marked as Respondent's Exhibit No. 13. And can you identify that?
A This is a copy of a document that I have in my files.
Q And that indicates that Mrs. Vallabhaneni changes her address with you people occasionally. Right?
A Yes.

MR. WILSON: I'd like to offer this as Exhibit No. 13, Your Honor.

THE COURT: Any objection? MS. WRIGHT: No objection.
THE COURT: Admitted.
(Respondent's Exhibit No. 13 admitted.)

Q (BY MR. WILSON) **Do you make it clear to people that if they have a change in marital status that they should report that to you**?
A **Yes**, we do.
Q Did Ms. Vallabhaneni subsequently make an application to bring her child, Deepika Pavuluri, to the United States as a rider on her application?
A Yes, she did.
Q Would it have been -- **did she apply as a married person or as a single person**?
A As a **single** person.
Q Okay. And was it ever updated at any point?
A The immigration files that I have indicate that she's been a widower all along, **no marriage of any kind**.
Q Now, would it have been simpler if Ms. Vallabhaneni's case for her to have brought her daughter over under -- if she were married, under her husband's passport, if he were a citizen? I mean, under her husband's status as a citizen of the United States?
A If a spouse is a United States citizen and the intended immigrant is in the United States, then there is what we call a status change in which the foreigner, the alien, will not have to leave the country. They can stay in the country and change their status from, for example, a visitor or a student to that of permanent resident.
Q I'm going to show you now what's been marked as Respondent's Exhibit No. 14. Can you recognize that as a record that's in your file?

A Yes, sir, it is.
Q Okay. And can you describe what that is?
A Yes. The cover page here is a memorandum from an attorney, Robert -- Robinson, Robert NG, and Associates from California, indicating that the people worked for -- Deepika has been approved and for her to go before the consulate officer, the U.S. American Consulate officer in India so that they could apply for a Visa so she could come over to the United States.
Q Okay. And would you infer from that that she's represented by counsel in all this, that she has an attorney that's helping her for this application?
A Yes, sir, Mr. Robinson Robert NG and Associates.
Q Okay.

MR. WILSON: I'd like to offer what's been marked as Respondent's Exhibit No. 14 into evidence, Your Honor.
MS. WRIGHT: No objection.
THE COURT: Admitted.
(Respondent's Exhibit No.14 admitted)

Q (BY MR. WILSON) Okay. Now I'm going to show you what's been marked as Respondent's No. 13. Can you identify that?
A Yes. This is the affidavit of support from Sudha to Deepika, the dependent daughter.
Q And what is the date of that, sir?
A It's dated **June 12th, 1995**.
Q 1995. And the address on it is what, sir?
A The address is 8820 Leo Street in Austin, Texas.
Q Okay. And **who did Ms. Vallabhaneni list as her spouse** on that record?
A It indicated "**not applicable**."

Q And **would you judge from that that she's not married**, or that she continues to be a widow?

A **Yes**. This affidavit of support is part of the file that was submitted as to the form that we just talked about, the Visa petition.

Q Is this affidavit of support **made under oath**, sir?

A **Yes**, it is.

Q And is it **signed by Ms. Vallabhaneni** on the third page?

A **Yes**, it is.

Q Does the INS require aliens who are here on a green card to report any possible source of income when they're making application for someone to come into the United States?

A It's the affidavit of support. It's required that they submit **all the support from their positions, employment, or a spouse** if they have a position also.

Q **So a spouse should have been listed there if she were married**?

A **Yes**, sir.

Q And a spouse is not listed there?

A No. The affidavit of support supports the previous document, which indicated that she was a widow. And so there's -- when we received this document and it indicated "not applicable," the information on the Visa was that she was a widow and so we didn't challenge that.

Q What is the INS position about notifying them of status changes, such as marital, address, employment, or any other change?

A **We have to have any type of changes** in addresses or status of that person.

Q And **do you-all consider that serious**?

A **Yes**, we do.

MR. WILSON: Let me offer into evidence, Your Honor, what's been marked as Respondent's Exhibit Nos. 14 and 15.

MS. WRIGHT: I'm sorry, the Affidavit of Support and what else?

MR. WILSON: The letter from the attorney.

MS. WRIGHT: No objection.

THE COURT: Admitted.

(Respondent's Nos. 14 and 15 admitted.)

MR. WILSON: And may I publish this to the Jury? And I will pass the witness, Your Honor.

THE COURT: Ms. Wright?

CROSS-EXAMINATION

BY MS. WRIGHT:

Q Mr. Reyes, if someone says to you in the process of filling out immigration papers that they are common-law married, will you just take their word for it?

A When they indicate that they're **common-law married**, we need to have **some kind of support, an affidavit, a document** to show that. In most cases, the United States Immigration Service in Texas will accept that, a common-law marriage, but **we need to have some sort of a documentation** issued by either a court or perhaps the two parties in agreement, signed and notarized.

Q So you would need a document signed by both of these parties and submitted to INS in order to change the status as indicated on an INS file?

A As soon as the parties, or one of the parties indicates that there's been a marriage, or a common-law marriage, the file will be in suspense until that area is

clarified. And we use whatever the code is for the State of Texas on common-law marriage.

Q Could they have -- could Ms. Vallabhaneni have moved forward with her daughter's immigration to the United States if her own file was in suspense?

A If her file was in suspense, she wouldn't have been able to move to the United States.

Q Do you remember Ms. Vallabhaneni?

A I've never seen her until just a few minutes ago.

Q And were you anywhere around when she filled out the document that's been submitted here today?

A These documents were submitted from the California office of the Immigration Service, to an attorney, Robinson Robert NG. I was not there.

Q Okay.

MS. WRIGHT: No further questions.

REDIRECT EXAMINATION

BY MR. WILSON:

Q Sir, the United States Government recognizes common-law marriages. Is that right?

A Yes, we do.

Q And **you** would **expect someone common-law married**, whether or not they've got a certificate or not, **to** come up and **inform you** -

A **Absolutely**.

Q -- of a common-law marriage?

A **Yes**.

Q And **if she had been married to Mr. Ganesan** here and applied as a citizen of the United States, **it would have expedited her bringing her daughter over here**?

A **Yes**, it would have.

Q You would have simply told her to go get the certificate. Right?
A Yes, that's correct.

MR. WILSON: Nothing further, Your Honor.
THE COURT: Ms. Wright?
MS. WRIGHT: No further questions.
THE COURT: Do any of the members of the juries have a question of this witness? I see a couple of hands.
(The jurors' questions were handed to the Judge and a Bench discussion occurred out of the hearing of the jury and court reporter.)

THE COURT: Okay, are you ready?
THE WITNESS: I'm ready.
THE COURT: "Does your office require, after the approval of an alien to become a citizen, to change marital status after becoming a permanent resident?"
THE WITNESS: **The Immigration Service requires** that **while you're a permanent resident** of the United States that **you tell us** where you live and what **your status is at all times** up until the time that you become a citizen of the United States. Once you're naturalized and become a citizen of the United States, then it's not required. These files are put away in storage and they're never seen again until they're asked for, for whatever reason.
THE COURT: "Do you send follow-up letters after a certain amount of time to get more information?"
THE WITNESS: No, we don't. **It's the responsibility of each person to let us know**. We have 200 million-plus files.

THE COURT: "Is it required by INS regulation to report **common-law marriages** as defined by the State of Texas?"

THE WITNESS: If they're submitting for some sort of a benefit through the Immigration Service, **we need to know about it**.

THE COURT: "On the affidavit of support, where is the marital status of Ms. Vallabhaneni listed?"

THE WITNESS: I'll have to check. It says "**Spouse** or Children," and it's as indicated "**Inapplicable**," meaning that there was no spouse and no other children other than the ones listed on the front page.

THE COURT: "Did you follow up on Ms. Vallabhaneni's case before this court date?"

THE WITNESS: I requested the files be sent to me from the District Office in California. And once I received the files, I did what -- I reviewed the files to determine what was in those files as far as the application and the affidavits that were in there.

THE COURT: Let me see the attorneys for a second
(At the Bench, off the record)

THE COURT: "Do you actually check out the marital status, or do you take the word of an applicant?"

THE WITNESS: When we interview, **we take the word of the applicant**. If they tell us they're single or if they're married, they have to support that with documentation.

THE COURT: "Would Ms. Vallabhaneni have been given any indication by someone in your office that there were ways to move her case along at a faster pace?"

THE WITNESS: With the information that's in the file, this was the only way that she could immigrate the daughter.

THE COURT: "Well, for example, would she have been told that marrying would better her status here in the United States?"

THE WITNESS: I don't know. I don't make that a habit of telling anyone that, if they were to marry somebody, they could immigrate much quicker. She was immigrating because of her skills, not because of her marital status.

THE COURT: Any follow-up, Mr. Wilson? Any brief follow-up?

REDIRECT EXAMINATION

BY MR. WILSON:

Q But **it is the responsibility of everyone to let your office know** if there's been a change in the status?

A **Yes**, it is.

Q And it's considered a breach of their responsibility if they don't follow through with that?

A **If** they don't follow through with that and if it's serious enough to where some of **the information in those affidavits or the information that's in the file is not true, we could follow up with some sort of a penalty or prosecution**.

Q Do you think this is serious?

THE COURT: Excuse me, may I see the attorneys here? (At the Bench, off the record)

THE COURT: Anything else, Mr. Wilson?

MR. WILSON: No, sir.

THE COURT: Ms. Wright, any follow-up?

RECROSS-EXAMINATION

BY MS. WRIGHT:

Q You earlier indicated that if you received word, verbal communication from an applicant that indicated that there was a common-law marriage, the application would be placed in suspense. Is that right?

A If you come to our office and you're submitting a document for benefits, we review the document line by line, and we ask you the questions that you completed in the documents. And we ask you what your marital status is, marital status. And if you tell me that you are -- you're single, but you're common law, under a common-law marriage, or you are married or something like that, you would have to submit some sort of proof to show us that that, in fac, [SIC] has taken place. We will put your file, or your application -- we won't do anything with it, we won't approve it nor will we reject it. We'll just put it in suspense until we can continue on with the interview.

Q And during the period of suspense, you can't act on the benefits, like for instance, moving your daughter from India to the United States. Is that right?

A You would have to have an approval. And on these documents that we have here, you will notice the stamp of approval with a signature of an official by it.

Q Okay, and so that would mean you wouldn't have an approval, you'd be in suspense, awaiting approval. And until you got approval, you couldn't move the daughter from India to the United States?

A That's correct.

Q And the proof that you would need would be one of two things, a document signed by both parties or a court order. Is that right?

A You could have other documents, according to whatever the common-law marriage laws are in Texas.

Q And you said you had some examples of documents that you would expect to use for --

A If I was to receive a document from the Court indicating that the common-law marriage was proper, that would be enough for us to go ahead and continue on with the interview.

Q Okay. So if this jury finds a common-law marriage and the Court makes an order that there's a common-law marriage in this case, you can make a change in the file?

A It would be a little late, because the file had been adjudicated, depending on how far back you go. If the Court decides today that they were married way back prior to when she indicated that she was single, then there's a discrepancy in the application, and so we would have to act on it somehow. But if the Court finds that the common-law marriage took place after these documentations were submitted, then at the time that the documentation was submitted, then what was in these documents is true in that there she was -- her status was single because she was a widow, not married.

MS. WRIGHT: Okay. Thank you.

THE COURT: Thank you for your testimony. You are excused.

AFFIDAVIT FROM PLAINTIFF
APPARAJAN GANESAN

Now comes plaintiff Apparajan Ganesan and states as follows:

Defendant Sudha Vallabhaneni fraudulently claimed a temple service attended by her and Mr. Ganesan on or about Nov. 24, 1994 at the Hindu temple in San Antonio (Archana) as a wedding ceremony. This claim is refuted by the Priest and the staff of the Venkatesnara Temple (Heliotes, Texas).

.

Defendant Vallabhaneni, on or about Feb 11, 1995, filed her California State tax return and her Federal tax return for 1994 through H&R Block declaring herself as a "single, head of household."

On or about May of 1995, Ganesan and Vallabhaneni visited England and India. Ms. Vallabhaneni, an Indian citizen, obtained a tourist visa for London, declaring herself as a "single."

When Ganesan and Vallabhaneni reached India, immigration approval for her daughter (from a prior marriage), Deepika Pavaluri, came through. Ganesan returned to Austin ten days later. In the subsequent month, Ms. Vallabhaneni, accompanied by her daughter Deepika Pavaluri, went to the U.S. Consulate in Madras, India, and made several sworn declarations regarding her marital status as "single." Rod Reyes, the INS agent who testified at the jury trial in the Travis County District Court in Sept. 1997, produced these documents.

Ms. Vallabhaneni declared herself as a "single" to her employer, who then denied health insurance to her unmarried partner Apparajan Ganesan.

On or about April 1996, Ms. Vallabhaneni filed her California partial resident tax return and her Federal tax as "single." Ganesan assisted her in the preparation of those tax returns.

On or about May 1996, Ms. Vallabhaneni decided to renew her Indian Passport. First, she filed her renewal form as a "single" with the Indian Consulate in San Francisco. Then, she re-filed the renewal declaring herself as a "single" with the Indian Consulate in Houston. When her new Passport arrived, Ms. Vallabhaneni checked it carefully for accuracy. Ms. Vallabhaneni noted an error in her birth date but saw nothing wrong with her marital status as "single." Yet again, when she had her Passport corrected for the birth date error, she again declared herself as "single."

On or about March 1997, Ms. Vallabhaneni filed her Federal tax returns for 1996, declaring herself a "single." H&R Block of Austin assisted her.

Throughout the entire period, Ms. Vallabhaneni opened several bank accounts declaring her marital status as "single." Also, through the entire period, Ms. Vallabhaneni made declarations in her auto insurance and life insurance forms that she was "single."

Ms. Vallabhaneni made numerous other assertions regarding her marital status as during the entire period. Ganesan has restricted this affidavit to instances where clear violations of Federal Laws of immigration, passport, insurance, and

banking would occur if Ms. Vallabhaneni's common law marriage claim is upheld.

Ganesan alleges that Ms. Vallabhaneni and her siblings entered into a vendetta against him because of centuries old caste prejudices between the Kamma and Brahmin communities. Prosecutors for Travis County repeatedly alleged this to the jury in the case the State lost against Ganesan on July 5, 2001, County Court III, Hon. Judge David Crain presiding, Case No. 492428 (all Court Reporter notes have been saved).

A fraud has been executed to deprive Ganesan of his wealth.

Ganesan asserts that a person cannot be both "single" and "married" at the same time.

Ganesan declares under penalty of perjury that the forgoing is true.

Signed:// Apparajan Ganesan
Apparajan Ganesan
TDCJ# 904088

Physical address:
Sanders Estes Unit
1100 Hwy. 1807
Venus Texas

Mailing Address:
C/O Douglas G. Marsh
1031 Graham St.
Bethlehem, PA 18015

NOTICE
INMATE NOTARY PUBLIC SERVICE

Under both Federal Law (28 U.S.C. §1716) and / or Texas State law (V.T.C.A. Civil Practice & Remedies Code, §132.001-132.003j, inmates incarcerated in Texas may use an Unsworn Declaration under penalty of perjury in place of a Written Declaration, Verification, Certification, Oath, or Affidavit Sworn before a Notary Public. An example of an Unsworn Declaration is as follows:

EXAMPLE ONLY

"I (insert offender name and TDCJ number), being presently incarcerated in (insert TDCJ Unit name), in (insert county name)_____ County, Texas, declare under penalty of perjury in pursuant of Federal Law (28 U.S.C. § 1746) and / or Texas State law (V.T.C.A. Civil Practice & Remedies Code, §132.001-132.003), that the foregoing is true and correct.

In a request for Notary Public service, each inmate must explain why an Unsworn Declaration is insufficient before Notary Public service will be provided.

NOTICE
NOTARY PUBLIC SERVICE DENIAL

Regarding your request for Notary Public service, insufficient justification was provided necessitating Notary Public service. However, you may proceed with an Unsworn Declaration.

On this the26th day, the month of NOVEMBER 2002, Offender Ganesan, Apparajan,TDCJ-ID# 904088 requested Notary Service for _____ and was denied as per Federal Law (28 U.S.C. § 1746) and / or Texas

State law (V.T.C.A. Civil Practice & Remedies Code § 132.001-132.003). He was subsequently given an Unsworn Declaration.

Signed:// Katherine McCoy 11/26/02
(Signature – Notary) (Date)

UNSWORN DECLARATION

I, Apparajan Ganesan , T.D.C.J.-ID# 904088, Petitioner, ProSe, being presently incarcerated at the Sanders Estes Unit, in Johnson County, Texas, declares under Penalty of Perjury that the foregoing instrument is true and correct to the best of my knowledge. Pursuant to Federal Law (28 U.S.C. § 1746) and State Law (V.T.C.A. Civil Practice and Remedies Code § 132.001 - 132.003). Executed on this day_____ of _____,20 _____.

Respectfully Submitted,

Signed:// Apparajan Ganesan
Petitioner, Pro Se

Alvis Carssow & Ingalls
5766 Balcones Drive, Ste. 201
Austin, Texas 78731

Attorneys
Tel: (512) 453-7290
Fax: (512) 302-0625

July 29, 1999

Honorable Sharon Pierce
U. S. Attorney's Office
816 Congress Ave., Ste. 1000
Austin, TX 78701

Dear Ms. Pierce:

I represent Apparajan Ganesan. Mr. Ganesan, a U. S. citizen, has been a successful businessman in this country for many years--until recently. Some time ago, Mr. Ganesan had a relationship with a Ms. Sudha Vallabhaneni, an Indian national in this country under a green card. The relationship ended and Ms. Vallabhaneni filed a lawsuit in Travis County alleging that she had been common-law married to Mr. Ganesan and requesting a divorce. Mr. Ganesan has vigorously contested the proceeding.

During the time of the alleged common-law marriage, and since she filed her lawsuit claiming a common-law marriage, Ms. Vallabhaneni represented her marital status as "single" in documents filed with the U.S. Immigration and Naturalization Service, as well as in tax returns filed with the Internal Revenue Service. She also represented herself as single with the U. S. State Department and with her employer.

In the divorce proceedings, an officer with the Immigration and Naturalization Service testified in substance that, based on the inconsistent position taken by Ms. Vallabhaneni in the

state court lawsuit and in her papers filed with the U.S. government, Ms. Vallabhaneni appeared to be doing something fraudulent in violation of the immigration laws and that she would get in trouble if she persisted. Since the time of that testimony, there does not appear to have been any action by either the Immigration and Naturalization Service or the Internal Revenue Service despite a number of meetings, telephone conferences and correspondence.

Essentially, the Immigration and Naturalization Service has stated that this matter does not rise to the level of importance required for their intervention. The Internal Revenue Service has likewise declined to become involved. My client believes that he is the victim of a fraud by Ms. Vallabhaneni, that she forced him into bankruptcy by interfering with a $900,000.00 payment to a Swiss subcontractor on a crucial business transaction, and that she has made false criminal allegations against him--he is in the Travis County Jail based on those allegations and is awaiting trial.

Mr. Ganesan has difficulty understanding how a foreign citizen can come into this country and do what Ms. Vallabhaneni has done with impunity, and without there being any apparent recourse through the agencies that are charged with the responsibility of investigating and enforcing the nation's immigration and tax laws. I told Mr. Ganesan I would write this letter to the U. S. Attorney's Office in hopes that his complaints might get some attention or priority that, so far, seems to have eluded him.

I would be delighted and anxious to give you or someone in your office more details if the U.S. Attorney's Office would like to hear more about this. The object is to penetrate the bureaucratic barriers in the agencies themselves that have

frustrated Mr. Ganesan to date. Thank you for your attention and courtesy.

Sincerely,

Signed:// John W. Alvis
John W. Alvis

JWA/gpc

Other Documentation Regarding Claims of Being Single by Vallabhaneni

Vallabhaneni's Federal I tax filings – Pro Se petitioner does not have a copy. A court order on the Internal Revenue Service would be required to obtain these documents.

Vallabhaneni's California State tax filings – Pro Se petitioner does not have a copy. A court order on the State of California would be required to obtain these documents:

Ms. Kathleen Andleman
Manager, Gen. Counsel Section
State of California
Franchise Tax Board, Legal Branch
PO Box 1720
Rancho Cordova, CA 95741-1720

Testimony of Internal Revenue Service agent at the Common-Law Marriage trial – Incarcerated Pro Se petitioner does not have a copy nor does the attorney who represented him in this case. Records should have been preserved, so testimony can be obtained from the Travis County court reporter.

1H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50193

APPARAJAN GANESAN
Plaintiff - Appellant

v.

SUDHA VALLABHANENI; BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT

Defendants - Appellees

PETITION FOR A PANEL REHEARING

Apparajan Ganesan, Pro Se
TDC 904088
Sanders Estes Unit
1100 Hwy. 1807
Venus, TX76084

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14. *Cramp v. Board of Public Inspection of Orange County, Fla.*, 82 S.Ct. 275, 368 U.S. 278	6
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31. *Jordon v. Hall*, 275 F.Supp.2d 773 11
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33. *Larsen v. Senate of the Commonwealth of Pennsylvania*, 955 F.Supp.1549, 1557-*1559* 3
34. *Lemmons v. St. Louis*, 222 F.3d 488, 494 11
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36. *Matter of Estate of Giessel*, 734 S.W.2d 27 6, 7

37. *Maynard v. Cartwright,* 108 S.Ct. 1853, 486 U.S. 356 6
38. *Mounkes v. Conklin*, 922 F.Supp 1501, 1503 11
39. *Nollet v. Justices of the Trial Court of Comm of MA*, 83 F.Supp.2d 204, 208 2
40. *Pennzoil v. Texaco*, 107 S.Ct. 1529 11
41. *Persons v. Persons,* 666 S.W.2d 560 6, 7
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50193

APPARAJAN GANESAN
Plaintiff - Appellant

v.

SUDHA VALLABHANENI; BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT

Defendants - Appellees

PETITION FOR A PANEL REHEARING

Now comes Appellant Apparajan Ganesan and states as follows:

This Court's Order in the above case (Attachment 1), filed on October 22, 2003, and mailed on October 24, 2003, was received by Ganesan on October 27, 2003.

As per Rule 40(a)(1), since an agency of the United States is a party to these proceedings, any party may seek a

rehearing within 45 days after entry of judgment. Ganesan seeks such a rehearing.

The Court's ruling does not clarify how the Rooker-Feldman doctrine prevents a Federal court from ruling on the Constitutional validity of the Texas Common Law Marriage statute or on how such a ruling cannot be done without considering the specifics of the instant case. Ganesan cites:

Feldman, 103 S.Ct. 1303, 460 U.S. 462:

> The court stated, however, that the district court did have subject matter jurisdiction to the extent that Hickey Feldman made a general challenge to the Constitutionality of the D.C. Bar Admission Rule.... The crucial point is whether the district court is in essence being called upon to review the state court decision.

Feldman, 460 U.S., at 486, 103 S.Ct. 1303, 1316-17:

> Federal courts do have jurisdiction over general challenge to state bar rules, promulgated by state courts in non-judicial proceedings which do not require review of a final state court judgment in a particular case.

Centifanti v. Nix, 865 F.2d 1422, 1430 (3rd Circuit)

Focus v. Allegheny County, 75 F.3d 834, 840 (3rd Circuit):

> Texas Common Law Marriage claims have led to judicial decisions which are all over the map. Ganesan's Constitutional claims would clarify it for all similarly situated future petitioners indicating prospective relief.

Doe Associates v. Napolitano, 252 F.3d 1026, 1029 (9th Circuit); *Edward v. Illinois Board of Admission to Bar*, 261 F.3d 723, 728-729 (7th Circuit):

> ...court does have jurisdiction over a general Constitutional challenge or one that does not require review of a final state court decision in a particular case.

Dubinka v. Judges of Superior Court, 23 F.3d 218,222 (9th Circuit): Ganesan's claim is not inextricably intertwined since the District Court has to scrutinize only the challenged rule and not the application of the rule. There is abundant case law, independent of the instant case, to support such scrutiny. Texas Common Law Marriage statute is not a challenge on any particular case.

Catz v. Chalker, 142 F.3d 279, 290-295 (6th Circuit):

> ... presented a Constitutional claim in which it was incidental that the underlying action was a divorce.

Johnson v. Rodrigues (Orozco), 226 F.3d 1103, 1108 (10th Circuit):

> ... plaintiff was mounting a discrete general challenge to the validity of Utah adoption laws, not challenging the merits of a particular state ruling.

Galloway v. City of New Albany, Miss., 92 F.Supp 2d 592, 596-597; *Hoyle v. Priest*, 59 F.Supp 2d 827, 833-835; *Nollet v. Justices of the Trial Court of Comm of MA*, 83 F.Supp 2d 204, 208; *Storck v. Suffolk County*, 62 F.Supp 2d 927, 938-939:

> Clearly, state court in the instant case did not decide constitutional issues in any of its decisions.

U.S. v Cotton, 122 S.Ct. 1781:

> Subject matter jurisdiction is a court's statutory or Constitutional power to adjudicate case.

Demore v. Hyung Jon Kim, 123 S.Ct. 1708, 1709, citing *Webster v. Doe,* 108 S.Ct. 2047 and *Johnson v. Robinson,* 94 S.Ct. 1160:

> When Congress intends to preclude judicial review of Constitutional claims, its intent to do so must be clear,

Larsen v. Senate of the Commonwealth of Pennsylvania, 955 F.Supp. 1549, 1557-*1559*:

> In the instant case, the state courts did not rule on the constitutionality of the Texas Common Law Marriage statute so a U.S. District Court exercising jurisdiction on the constitutionality issue would not overrule prior state court judgment.

V.T.C.A. Family Code § 2.401(a)(2) defines the proof for an informal marriage to be:

(a) The man and woman agree to be married,

(b) and after the agreement, they live together in this state [Texas] as husband and wife,

(c) and there [in Texas] represented to others that they were married.

The Constitutional issues are:

Can representing to others in Texas (as married) differently from elsewhere (as single) pass Constitutional muster (a person cannot be both married and single at the same time).

Does living together as husband and wife in Texas while living separate elsewhere pass Constitutional query?

Does No. (3) apply to both parties individually **or** together in their representation, or should they do so individually **and** together, and only in Texas? Clearly, vagueness and overbreadth of this statute and its Constitutionality can be examined **without any** intertwining of the issues involved in this specific case.

Marks v. Stinson, 19 F.3d 873, 885-886 (3rd Circuit):

> ... constitutional and fraud claims had not been determined by state court, nor were they inextricably intertwined with prior state court decisions; Court could find that fraud and Constitutional claims had merits without also finding that state court erred when it dismissed the action ....

Peterson Novelties v. City of Berkley, 305 F.3d 386, 392 (6th Circuit):

> ... federal courts could hold that the defendants violated retailer's Constitutional rights without implicitly holding that the state court wrongly decided the issue before it ....

Tesmer v. Granholm, 114 F.Supp 2d 603, 615-616:

> Rooker-Feldman doctrine did not bar review of Constitutionality of state bar's general practice of denying appellate counsel following plea based conviction, since the particularities of indigent defendant's cases were not at issue.

Ganesan notes two other unconstitutional aspects of the Texas Common Law Marriage statute:

V.T.C.A. Family Code § 2.401(b) (Proof of Informal Marriage) states:

If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

Clearly, the Texas Common Law Marriage statute has a built in "evanescence" presumption that no other form of marital contract has, giving a built-in vagueness.

Further, V.T.C.A. Family Code § 1.101 (Every Marriage presumed Valid) states

[I]t is the policy of this state to preserve and uphold each marriage against claims of invalidity unless a strong reason exists for holding the marriage void or voidable.

Ganesan asks the court to take into note the draconian overbreadth of this law giving it a "presumption of validity." Ganesan notes the Pennsylvania Common Law Marriage statute, which was recently struck down (attachment 4), at least put a heavy burden of proof on the party claiming common law marriage, and such requirement of proof is not even present in the Texas statute.

In addition to vagueness and overbreadth, a statute can be facially unconstitutional if it

(a) enforcement results in violation of criminal laws,

(b) violates supremacy clause (Federal law supercedes state law), or

(c) produces axiomatically incorrect results (sun rises in the west; person can be single and married at the same time).

Ganesan cites some relevant case law and cites on Constitutionality:

Zwickler v. Koota, 88 S.Ct. 391, 389 U.S. 241:

> Statute is void for vagueness which forbids or requires doing an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

Boutilier v. Immigration and Naturalization Service, 87 S.Ct. 1563, 387 U.S. 118:

> Void for vagueness doctrine is applicable to civil as well as criminal actions where extraction to obedience to rule or standard is so vague an indefinite as really to be no rule at all, i.e., where exaction strips participant of rights

Hynes v. Mayor and Council of Borough of Oradell, 96 S.Ct. 1755:

> Supreme Court could not construe state statute so as to cure unconstitutional vagueness.

City of Chicago v. Morales, 119 S.Ct. 1849, 527 U.S. 41:

> Imprecise laws can be attacked on the face under two doctrines: first, the overbreadth doctrine permits the facial invalidation of laws that inhibit the excise of First Amendment rights if the impermissible application of the law are substantial when judged in relation to statute's plainly legitimate sweep; second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and the public that are sufficient to guard against the arbitrary deprivation of liberty interests....

> A law fails to meet the requirements of due process clause if it is so vague and standardless that it leaves the public uncertain to the conduct it prohibits.

Cramp v. Board of Public Inspection of Orange County, Fla., 82 S.Ct. 275, 368 U.S. 278:

> Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech.

Zellerbach Paper Co. v. Helvering, 55 S.Ct. 127, 293 U.S. 172:

> Statute of uncertain meaning will not be readily made an instrument for much hardship and confusion.

Maynard v. Cartwright, 108 S.Ct. 1853, 486 U.S. 356:

> Vagueness challenges to statutes not threatening First Amendment interests are examined in light of facts of case at hand; statute is judged on as-applied basis.

Review of constitutionality of Texas Common Law Marriage statutes could be easily done based on the plethora of conflicting Texas state court decisions without ever reviewing the instant case. From *Matter of Estate of Giessel* 734 S.W.2d 27; *Persons v. Persons* 666 S.W.2d 560; *Winfield v. Renfro* 821 S.W.2d 640, Ganesan noted that the District Court could make such a determination based on other Texas case rulings. Clearly, the District Court has jurisdiction on the issue and is not prevented in any way by the Rooker-Feldman doctrine from doing so.

In the case instant case, Ganesan's original complaint mounts a general challenge to the Constitutionality of a state

statute or rule. Further, it does present this Court with a Federal claim for adjudication. The statute on its face is vague regarding representation as to where, by whom, and how often.

That the statute repeatedly produces verdicts in conflict with Federal income tax declarations resulting in fraud (some legal scholars opine this as social engineering by the Texas Judiciary) could easily have been ascertained from *Matter of Estate of Giessel*, 734 S.W.2d 27. In *Giessel*, Texas courts ignored repeated affirmations in income tax forms as "single." That such action could lead to criminal law violations could have been inferred from *Persons v. Persons,* 666 S.W.2d560.

That common law marriage statutes have become outmoded and unconstitutional can be inferred in that 39 states no longer have them. Most recently, see Attachment 4 regarding the Pennsylvania statute.

The Texas Common Law Marriage statute cannot stand Constitutional scrutiny, without any need to consider the specifics of the instant case. Ganesan notes that whether a general Constitutional challenge is barred by Rooker-Feldman is tested in *Wilson v. Shumay*, 264 F.3d 120, 125 (1st Circuit) through the following two questions: (1) Does the substance of the claims refer to the personal circumstances of the case? (2) Would all the relief sought impact petitioner individually? Petitioner addressed both these questions in his briefs, and in both cases the answer is "no."

Ganesan also notes that the Federal courts acquired jurisdiction on this question when Ganesan's bankruptcy was filed (Jan. 27, 1998). Although the jury affirmed common law marriage in Sep. 1997, interlocutory verdict was not

entered by the state judge until **after** Ganesan notified his intent to file for bankruptcy. Under the circumstances, it is unclear if the settlement for bankruptcy leaves this claim with the debtor but with jurisdiction still in the Federal courts, or does the jurisdiction return to the State courts?

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined" (*Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct.2294, 33 L.Ed.2d 222 [1972]). The void for vagueness doctrine prohibits the enforcement of a law that contains words "so vague the [persons] of common intelligence must necessarily guess at its meaning and differ on its application" (*Roberts v. U.S. Jaycees,* 408 U.S. 609, 629, 104 S.Ct. 3244, 82 L.Ed. 462 [1984] quoting *Connally v. Gen. Constr. Co.,* 269 U.S.385, 391, 46 S.Ct. 126, 70 L.Ed. 322 [1926]). Further, in *Roberts*, at 629, Legislation "must articulate terms 'with a reasonable degree of clarity' to reduce the risk of arbitrary enforcement and allow individuals to conform their behavior to the requirements of the law."

In determining whether an ordinance is unconstitutionally vague, a court must examine the words of the ordinance and consider interpretations of comparable laws. A court must also keep in mind that "[C]ondemed to the use of words, we can never expect mathematical certainty from out language" (*Grayned,* 408 U.S. at 110, 92 S.Ct. 2294). "[F]lexibility and reasonable breadth" in the language chosen is acceptable (Id.; see also *City of Portland v. Ariz.,* 47 Or. App. 937, 615 P.2d 1109, 1114 [1980] stating that flexibility is not equivalent to vagueness. Further, the Federal court must "consider any limiting construction that a state court or enforcement agency has proffered" (*Gresham,* 225 F.3dat 908 quoting *Vill. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 N.5, 102 S.Ct. 1186, 71 L.Ed.2d 362 [1982]).

The practice of striking down a law because it is void for vagueness is not unique to First amendment jurisprudence, but rather it is a general principle of Constitutional and criminal law (Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech,* § 6.13 [2003]).

Ganesan asserts that the third provision of Texas Common Law Marriage statue, V.T.C.A. 2.401(a)(2):

(a) is vague,

(b) 'reasonable person' standard cannot be read into it (reasonable person would not selectively hold oneself singularly married and unmarried and only in Texas),

(c) narrowing construction is not available (since it is the goal of the state of Texas to find marriage [V.T.C.A. § 1.101: "It is the policy of the state to preserve and uphold each marriage against claims of invalidity unless a strong reason exists for holding the marriage void or voidable."]), and

(d) statute cannot be saved by striking unconstitutional third provision, since intent of getting married (provision one) and living together (provision two) would not constitute marriage in a modern society.

"The level of precision a statute must contain to survive vagueness challenge depends, in part, upon the nature of the enactment" (*Ford Motor Co. v. Texas Dept. of Transp.,* 264 F.3d 493). "Statute is unconstitutionally vague if required course of conduct is stated in terms so vague that people of common intelligence must guess at what is required" (*Texas Dept. of Public Safty v. Chavez,* 981 S.W.2d 449). "Law is 'facially vague' if its terms are so lose and obscure that they cannot be clearly applied in any context" (*Basiardanes v. City of Galveston,* 682 F.2d 1203 [14th Amendment]). "Statute may be assailed on grounds of vagueness when it either requires or forbids the doing of an act in terms so

vague that ordinary men must guess at its meaning" (*Pervis v. Lamarque Independent School District,* 328 F.Supp. 638, 466 F.2d 1054). "Unconstitutional statute is void *ab initio* having no effect as though it had never been passed" (*Alexander v. Cockrell,* 294 F.3d 636). "A facial Constitutional challenge claims that a statute is invalid in toto and therefore incapable of any valid application" (*Bryant v. State,* 47 S.W.3d 80).

Ganesan also requests this Court reconsider its opinion in light of the Pennsylvania Appeals Court overturning the Pennsylvania Common Law Marriage statute (*PNC Bank Corporation v. Workers' Compensation Appeal Board (Stamos),* PA Appeals Court, 860 C.D. 2002, Attachment 4, and *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 552 Pa. 253 [1998], Attachment 5) for reasons similar to those argued by Ganesan in this case.

Ganesan's supplemental cites (Attachments 2 and 3) to this Court unfortunately were received in this Court's mailroom on the same day as the ruling was made (October 22, 2003) so were not part of the Court's consideration. Ganesan requests this Court consider the significant discontent among respected jurists over the ever expanding reach of the Rooker-Feldman doctrine in recent years, given in the supplemental cites.

Further, Ganesan requests the Court clarify the "invocation of judicial helplessness" against the "virtually unfailing obligation to exercise jurisdiction given to the Federal courts":

Ahmed v. State of Washington, et al, 276 F.3d 464 (9th Circuit, Aug. 28, 2001), Judge Noonan, in a dissenting opined, on *Rooker-Feldman*:

> It is a rule that permits invocation of "jurisdictional helplessness"---"What Could I do? The doctrine in mandatory."

City of Houston v. Hill, 482 US at 467; *Colorado River v. United States*, 424 US 800, 817; *Mounkes v. Conklin*, 922 F.Supp. 1501, 1503:

> Abstention from jurisdiction is exception and not the rule; Federal courts have virtually unflagging obligation to exercise jurisdiction given them.

For Certiorari purposes, Ganesan requests this Court take judicial note of the application of Rooker-Feldman doctrine among various Circuit Courts. In *Pennzoil v. Texaco*, 107 S.Ct. 1529, separate concurrences of a majority of judges opined that Rooker-Feldman doctrine would not automatically bar a federal claim not raised in state court, buttressing the 10th Circuit's position of affording doctrinal sanctity only to state court **judgments** (*Kenman Engineering v. City of Union*, 314 F.3d 468). The 7th Circuit opines the doctrine does not prohibit re-litigation of claims and issues (*Gary v. Geils*, 82 F.3d 1361, 1365). The Supreme Court, in *Feldman*103 S.Ct. 1303, 1314-1316, allows a general challenge to the Constitutional challenge of a statute and buttresses the 8th Circuit's position in *Lemmons v. St. Louis*, 222 F.3d 488, 494, the 3rd Circuit's position in *Centifani v. Nix*, 865 F.2d 1422, 1430, the 9th Circuit's position in *Dubinka v. Judges*, 23 F.3d 218-222 and *Doe Associates v. Napolitano*, 252 F.3d 1026-1029, and the 10th Circuit's position in *Johnson v. Rodrigues*, 226 F.3d 1103, 1108.

Most Circuit Courts have held Rooker-Feldman doctrine not binding on claims stemming from pre-litigation proceedings (page 3 of 26 of Reply Brief, Vallabhaneni's false claim of a fraudulent business arrangement was used to

freeze Ganesan's assets). The 5th Circuit is unique in that it almost always cites jurisdictional helplessness (see *Jordon v. Hall*, 275 F.Supp.2d 773 and its 5th Circuit citations). Ganesan could find scant cites where the 5th Circuit held Rooker-Feldman doctrine did not apply, e.g., *American Airlines, v. Dept. of Transportation*, 202 F.3d 788, 801.

In light of the above, Ganesan also requests this Court reconsider its ruling regarding sanctions. Ganesan's appeal definitely did not lack an arguable basis in law.

Pro Se litigant Ganesan prays for all the remedy available under the law.

LIST OF ATTACHMENTS

[Attachments NOT included in this Appendix]

1. Court's Order in this case.
2. Motion to Amend Appellant Reply Brief – Rule 28(j)
3. Amendment to Appellate Reply Brief Per Rule 28(j)
4. Pennsylvania Appeals Court opinion on common law marriage -- *PNC Bank Corporation v. Workers' Compensation Appeal Board (Stamos)*, PA Appeals Court, 860 C.D. 2002 -- and New York Times announcement of same Sept. 19, 2003.
5. *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 552 Pa. 253 [1998]
6. V.T.C.A. Family Code § 1.101 Every Marriage presumed Valid
7. V.T.C.A. Family Code § 2.401 Proof of Informal Marriage

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the above was been placed in the US Postal Service mail system to recipients at the addresses below on this 2nd day of December, 2003.

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West's Encyclopedia of American Law
West Group, © 1998, ISBN: 0-314-20160-2
Vol. 7, p. 138:
Except from "Marriage"

In the United States, marriage is regulated by the states. At one time most states recognized COMMON-LAW MARRIAGE which is entered into by agreement of the parties to be husband and wife. No marriage LICENSE is required nor is a wedding ceremony necessary. The parties are legally married when they agree to marry and subsequently live together, publicly holding themselves out as husband and wife. The public policy behind the recognition of common-law marriage is to protect the parties' expectations, if they are living as husband and wife in every way except that they never participated in a formal ceremony. By upholding a common-law marriage as valid, children are legitimized, surviving spouses are entitled to receive SOCIAL SECURITY benefits, and families are entitled to inherit property. These public policy reasons have declined in popularity. **Most states have abolished common-law marriage,** in large part because of the legal complications that arose concerning property and INHERITANCE. [bold emphasis mine]

The Supreme Court, for example, struck down laws in southern states that prohibited racially mixed marriages. These antimiscegenation statutes were held to be unconstitutional in the 1967 case of *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010, because they violated EQUAL PROTECTION of the laws.

On the other hand, the Supreme Court ruled in 1878 that polygamous marriages (having more than one spouse simultaneously) are illegal. The requirement that marriage

involve one man and one woman was held to be essential to Western civilization and the United States in *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244. Chief Justice MORRISON *R.* WAITE writing for a unanimous court, concluded that a state (in this case Utah) may outlaw POLYGAMY for everyone, regardless of whether it is a religious duty, as the Mormons claimed it was.

Acknowledgements

Pro Se litigant Apparajan Ganesan gives thanks to fellow inmates in the Texas Department of Corrections systems Daniel Lucio and John Shinault, without whose thought provoking discussions and tireless legal and moral assistance this writ would not have been possible.

My sincere thanks to all the various counsels who have represented me during the past few years of painful litigation, who spent substantial time and effort clarifying the issues involved.

Also, thank you to counsels Donald Verrilli, Jr., of Jenner and Block, LLC, Washington, DC, and Stephen J. O'Brien of Stephan J. O'Brien and Associates, Pittsburgh, PA (respondent's counsel in PNC Bank v. Workman's Compensation) who supplied several Briefs and Responses which proved enormous valuable guidance as to form, presentation, and legal arguments.

Finally, I give special thanks to the enormous help provided by D. G. Marsh for helpful comments, word processing, obtaining printing, and mailing this document and to attorney Ted Terry for his early warning about the "three humped camel."

Signed by: A. Ganesan